United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

358

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,892

HENRY KLEIN, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 21,894

WALTER F. RIGGIN, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 21,895

EARL W. TAVENNER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 21,889

ROBERT HAMILTON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW[1]

I

Was the search and seizure in this case under a warrant permitting the officers to seize all books, records, papers and paraphernа-

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[1] This case has not previously been before this Court.

lia "maintained in the furtherance of the conspiracy" too broad under the rule of *Stanford v. Texas*, 279 U.S. 476?

II

Did the Trial Court commit error in refusing to grant a request by the defense to have the principal government witness psychiatrically examined for the purpose of affecting credibility?

III

Are defendants in a criminal case entitled to examine all of the Grand Jury testimony of the prosecution's principal witness, particularly where such witness' credibility is a major issue?

IV

Are tape recordings and oral testimony of telephonic and face to face conversations between a defendant and an informer admissible in evidence, in the light of recent Supreme Court decisions, and was consent to such electronic surveillance given by the informer freely and voluntarily, without direct or implied threat or promise?

V

Does the record in the present case establish that the government proved not one but numerous conspiracies to the prejudice of each of the Appellants?

VI

Whether the use against one Appellant of the tape recordings made after the end of the conspiracy, prejudiced the other Appellants and denied them a fair trial, in view of the fact that the other Appellants were mentioned in the tape recording and the prosecution emphasized that fact.

VII

Did the use of the identical evidence used against Appellant Hamilton in obtaining an earlier conviction involving the so-called "Greek Church" prejudice him in that the same amounted to double jeopardy?

VIII

Did the Triăl Court abuse its discretion to the prejudice of the Appellants in permitting the jury, during its deliberations, to have replayed for them the tape recordings, in view of the fact that the Trial Court refused to honor their request to have the testimony of the principal witness before the Grand Jury read?

JURISDICTIONAL STATEMENT

These are appeals from judgments of the United States District Court for the District of Columbia entered on January 19, 1968, rendered upon verdicts of a jury convicting each of the Appellants of violating Section 371 of Title 18, United States Code (conspiracy) and the individual Appellants of substantive crimes. The judgments of conviction being final orders of the United States District Court for the District of Columbia, this Court has jurisdiction under 28 U.S. Code, § 1291. Notices of appeal were filed by each of the Appellants on January 29, 1968. All appeals were consolidated by order of this Court.

STATEMENT OF THE CASE

The Appellants were tried in the lower Court on a seven-count indictment, charging all Appellants with the crime of conspiracy and the individual Appellants with certain substantive crimes. The conspiracy count alleged that the conspiracy commenced on January 1, 1964 and that Appellants conspired, combined, confederated and

agreed together and with each other and with Robert Earl Barnes and others to commit crimes against the United States, namely, interstate transportation of stolen property (18 USC 2314), housebreaking (22 D.C. Code 2201), offenses committed beyond the District of Columbia (22 D.C. Code 108), and receiving stolen goods (22 D.C. Code 2205). The indictment alleged that as part of the conspiracy, information would be provided to Barnes to facilitate the carrying out of the proposed offenses, and that he would be aided and abetted by others in carrying out said offenses. And it was further alleged that as part of the conspiracy property stolen by Barnes would be received and brought fraudulently within the District of Columbia from Barnes with knowledge or with reason to believe that the same had been stolen and transported in interstate commerce. Twenty-one overt acts were alleged. All appellants were found guilty under this Count.

The second count of the indictment charged Appellants Klein and Tavenner with housebreaking in connection with the home of Helen P. Bastedo. The third count charged the same Appellants with larceny of the Bastedo property. The jury returned a verdict of guilty on both counts.

The fourth count charged Appellant Hamilton with transporting in interstate commerce stolen fur coats and fur pieces of a value in excess of $5,000.00. The verdict on this count was "not guilty."

The fifth and sixth counts charged Appellants Riggin and Hamilton with housebreaking and larceny in relation to the premises and property of Sara Kotz. Each appellant was found guilty.

The seventh count charged that Robert Earl Barnes stole property of one Betty G. Veccione consisting of jewelry and cash money, and that Appellant Klein feloniously and unlawfully brought or caused said property to be brought into the District of Columbia. The jury returned a verdict of guilty.

Prior to indictment, a search warrant was obtained from the United States Commissioner upon the affidavit of certain police officers to search premises 1009 E Street, N.W., occupied by Klein Jewelers, (Appellant Klein's place of business), upon which premises it was alleged that there was being concealed certain property, namely "books, records, receipts, sales slips, repair slips, appraisal data, customer lists and related papers, documents, writings, printings and related paraphernalia maintained in the furtherance of the conspiracy described in the attached affidavit and any fruits of such housebreakings, larcenies and interstate transportation of stolen property as set forth in said affidavit". In executing the search warrant, the police entered upon the premises and seized all books, records, writings and every other item resembling any record which could be found upon the premises, threw them into boxes and bags and removed them from the premises (TR-651-656). In addition to papers and documents, there was seized one envelope containing 15 small diamond chips which had no identification connecting the same with any transaction set forth in the affidavit supporting the search warrant, and which in fact was not introduced into evidence. As a matter of fact, the police recovered nothing that Barnes identified as having been stolen. (TR-664).

A motion to suppress and for return of property was filed on the ground that the search warrant was insufficient on its face in that it failed to describe with sufficient particularity the things to be seized, that said search was in the nature of a fishing expedition, leaving it entirely to the discretion of the officers executing the warrant to determine what was covered by the warrant, all in violation of the Fourth Amendment. The motion was denied, and objection to the introduction of the seized records was overruled (TR-650).

Prior to trial, Appellants moved the Trial Court to permit a psychiatric examination of the principal government witness, Robert

Earl Barnes. This motion was predicated in part upon the fact that from the transcript of the record in an earlier case titled United States v. Lawrence F. Wallace et al, U. S. District Court Cr. No. 486-66, (now on appeal to this Court) it was demonstrated that Barnes might be a psychopathic liar, or suffering from some other mental condition which would reflect upon his credibility.[2] This motion was also denied. *United States v. Klein*, 271 F.Supp. 506, 507.

The trial record in the case contains in excess of 7000 pages. The principal witness for the prosecution was Barnes, who, by his own admission, was a professional burglar, having been released from Missouri State penitentiary shortly before January 1, 1964. He testified, "I know my word isn't worth anything" (TR-4144); that if it suited his purpose and would help him, he would lie. "I never have claimed to be very ethical" (TR-3056); that in winning an acquittal in a housebreaking case, of which he admitted on the stand at this trial to be guilty, he produced witnesses who gave perjured testimony with his knowledge and at his request. He did the same thing in a second case in the District Court, knowingly suborning perjury (TR-1634-5, 4116). He admitted that prior to being called to Court in this case, he informed the police that if they did not honor his request to be moved from the jail—which they did—they would not have a witness to testify (TR-1597). He further testified that while being held as a material witness for the government, he was provided with living quarters on the seventh floor of the United States Court House, which houses this Honorable Court, and was permitted to have whiskey and nocturnal visits by women (TR-1663-4).

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[2]Counsel argued that the gross inconsistencies in Barnes' testimony indicated some possible mental condition. For example, Barnes insisted that Detective Rogers arrested him at his home on 19th Street, N.W., whereas the records introduced at Trial proved that Barnes surrendered himself at No. 14 Precinct in Northeast Washington.

Barnes testified as follows:

That as soon as he came to the District of Columbia, he began burglarizing, and came to know one Steve Xydas, the operator of a restaurant in Northeast Washington. On the very day he met Xydas, he also met Detective Wallace and one James Skinner Skeens at Xydas' restaurant (TR-1147-1148, 1608). After this meeting and still on the same day, Barnes was taken by Skeens to a place called the "Greek joint" where he was introduced around, and from the Greek joint, he was taken on the same day to meet Appellant Klein (TR-1609). At Klein's jewelry store, Skeens told Klein that Barnes was looking for somebody to sell some hot stuff to, and that Klein said that he would buy what Barnes could get, and further, that he would set up some places for him to burglarize "on a 10% basis with first choice to purchase the merchandise". The 10% was to be paid if Klein bought the merchandise and was to be deducted from what Klein gave him. At a later point in his testimony, however, Barnes states that his deal with Klein was to give him 10% of everything he got out of a house, regardless of who bought the merchandise (TR-3004). This is the only evidence of any agreement in the record.

On the very first day he met Klein, the very same day he met Xydas and Detective Wallace, Barnes stated that he was given the names of three persons to burglarize. These three were Dr. Burbridge, an attorney by the name of Brylawski, and a man by the name of Debuse (TR-1251). He burglarized all three houses.[3]

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[3]In an affidavit filed by Barnes in September 1965, he stated that he met Wallace in April 1964, which was months after these houses were burglarized. He admitted that he told Grand Jury that affidavit was accurate (TR. 1999) Before Grand Jury he could not remember Brylawski's name (TR. 3005).

As demonstrated by the testimony, witness Barnes had a faculty for remembering in minute detail exactly what he stole from various houses, unless, as he testified, he got nothing of importance out of them. Having this faculty to remember details, it is interesting therefore to note the great discrepancies in his testimony where it concerns the person who set the job up, as will be demonstrated from the recorded evidence.

With respect to the Brylawski residence, Appellant Klein told him that the best time to burglarize the place would be on a Sunday, which he did.[4] He described in detail jewelry obtained which included a diamond-studded pearl bracelet, a diamond-studded pearl necklace, an imitation star sapphire ring, a white mink jacket, a black mink jacket, a ladies' watch with diamonds, and some earrings made by Dior. None of this jewelry was sold to Klein or to any other defendant on trial (TR-1253-1254). Mr. Brylawski testified that he did not know Appellant Klein or any other Appellant, and that neither he nor his family had ever done business with Appellant Klein (TR-767). On the other hand, he testified that he did know a Mr. Nyberg of Carr Jewelers (TR-769). Significantly, Barnes admitted that Nyberg set up about 50 jobs for him, that he sold the Brylawski jewelry to Carr's Jewelers, and that he may have associated "some other jeweler" with the Brylawski housebreaking[5] (TR-2034-2036).

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[4]Brylawski testified that he was away from home on this day only by chance (TR. 768).

[5]Barnes said that he did not meet Carr's Jewelers until about two weeks aafter the Brylawski job (TR. 1877). The first thing he ever sold to Carr's was from the Brylawski job. He denied telling the Grand Jury that Carr's set up the Brylawski job with Klein (TR. 3007), but that if he did tell the Grand Jury that Carr set it up, he corrected it. He does not deny that he told the Grand Jury that Carr actually gave him the address of Brylawski (TR. 3011), although at another place, he said he did not meet Carr's untill two weeks after the Bry-

During the defense, Appellant Klein called as a witness FBI Agent Marquise who testified that he was assigned to investigate information furnished by Barnes. He stated that Barnes told him that the Brylawski housebreaking case was set up by the owner of Carr's Jewelers (TR-5626).

Barnes testified that out of Dr. Burbridge's house, he obtained a target pistol and a second item which he could not remember. From the Debuse house, he obtained one television set (TR-1416-1417). He made no mention of obtaining any jewelry.

Barnes further testified that during the month of February, 1964, Appellant Klein gave him seven houses to burglarize, all in number 8 precinct. Barnes could remember only the names of four of these, namely, Dr. Ryland, Dr. Herford, Dr. Fabrizio and a Mr. Edson. Significantly, all of these houses are on Tilden Street, each within less than two blocks of the others, all were burglarized on the same day, February 15, 1964, none was a customer of or knew Appellant Klein, or any other Appellant in this case, and nothing taken from their homes was sold to or received by Appellant Klein. (See TR-617, 623, 794, 1019). It is also of some significance, it seems, that many of the houses broken into were doctors' homes.

Barnes testified that in the month of May, 1964, he burglarized the home of one Helen Bastedo, located on Woodland Drive. This home is located in the same block as that of Brylawski (TR-1786). He stated that Appellant Klein called him and advised him that a friend of his had a good score all lined up, and when he told him the friend was one Fontana, Barnes stated that he already knew him. Klein told him to get in touch with Fontana, which he did.

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lawski job. At another point he stated Xydas sold the jewelry to Carr's for him (TR. 3013). The U.S. Attorney stipulated that Barnes never corrected his tes-mony before the Grand Jury.

All the information was obtained from Fontana (TR-1254). Barnes testified that he never saw Appellant Klein and Fontana together (TR-1466), and the government offered no proof that Klein did in fact know Fontana. In his testimony, Klein denied knowing Fontana (TR-5995-6).[6]

Barnes testified that he broke into the Bastedo house twice on the same night. The first time he went there with one Sal Teresi and with no one else (TR-1256-1258). On this occasion, he took some furs.[7] While there, he discovered that there was a safe, but he had no tools with which to open the safe. He then left and got Skinner Skeens and Appellant Tavenner and returned to the house. From the safe, he obtained some jewelry which he described in detail. Appellant Tavenner received $400.00 out of this job, and Klein bought about $500.00 or $600.00 worth of the jewelry, no rings, just some pearls and little pendants.[8] In this case, he denied that he had testified before the United States Commissioner that he had sold most of the jewelry to Klein for $3,500.00 (TR-1715-1717). He also related the sale to Klein to the fact that the house-breaking occurred on Saturday and Klein was closed when contacted (TR-1785). It was stipulated at trial that the Bastedo house was in fact broken into on Tuesday.

Contrary to his testimony at trial, Barnes testified before the Grand Jury that Fontana had told him beforehand that there was a

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[6]Barnes testified that he met Fontana through Xydas when he sold him some television sets (TR. 1787).

[7]Barnes testified at another point that on the occasion when he took the furs, nobody was with him and that he did not get Teresi until after he got Appellant Travenner and Skeens (TR. 1790).

[8]Agent Marquise testified that he discussed the Bastedo case with Barnes who identified some of the people that he had sold the jewelry to; at no time did he state that anything was sold to Appellant Klein (TR. 5630).

safe in the Bastedo house and "so I got the tools ready during the afternoon and that evening, I called Skinner (Skeens) and I told him this was an easy score, that the woman was supposed to have a bunch of silverware and furs and just a whole bunch of stuff in the house. As long as we are going in and have all night, we may as well clean it out". So they got hold of Sal Teresi and Tavenner and about 7:00 P.M., they drove out and they all went into the house. Since the tools they had brought could not punch the safe, they had to "peel" it. Barnes admitted that he so testified before the Grand Jury but stated that he later on repudiated that statement, and told the Grand Jury it was different, that he went before the Grand Jury and gave the same testimony as he did in Court (TR-1835-1838). There was nothing in the Grand Jury record turned over to the defense showing any repudiation by Barnes. Mrs. Bastedo testified that she did not know any of the Appellants and had never dealt with Klein Jewelers (TR-1058-59).

Barnes further testified that he burglarized the home of Senator Hart on Calvert Street. This house is located in the immediate vicinity of the Bastedo and Brylawski homes. He described in great detail the jewelry which he stole from this house. He testified further that there was no question about the fact that Appellant Klein set the house up for him and that Klein bought all the jewelry from this job except one bracelet, which he sold to someone else (TR-1675-1684). Senator Hart testified that he did not know any of the Appellants and had never dealt with Klein Jewelers (TR-980-981).

On cross examination, Barnes admitted that he gave the following testimony to the Grand Jury in answer to questions by Mr. Sullivan, the same prosecutor who was trying the case:

> "Question. Mr. Barnes, in a good, loud, clear voice, so all the ladies and gentlemen can hear what

you have to say, please tell them now about the burglary of the home of United States Senator Phillip Hart, on July 11, 1964, and the arrangement by which that burglary was set up, and the arrangement by which the property taken in that burglary was disposed of in Washington, in the District of Columbia area.

"Answer. In June of 1964, I was at Clark Fontanna's paint store at Fourteenth and P Streets, Northwest, and Fontanna, he owns the store, he is a gambler of some sort, and he asked me—he told me he had a store (sic) lined up for me pretty soon. He bought different stolen merchandise from me in the past.

"So, either that same day or the next day he called me and gave me Senator Hart's name and address and told me to go case the house. It is on Cleveland Avenue, I believe, right off of Calvert Street.

"So I went over and looked at the house, and then I went back and talked to him, and he told me the Senator was not home; that is, I believe his wife was in Michigan at a summer cottage. I think that is what he told me, and that there wouldn't be nobody there; they had a maid on Saturday, but that she went out of the house at different times of the day. I think she got off at 12:30 or 1:00 o'clock.

"I decided I would go ahead and make the house that Saturday, and so about 12:30 in the afternoon—I use a screwdriver—and I went in Senator Hart's house.

"After I got in there I took, I think, one portable television and $200 in cash, I believe in $50 bills. I am not sure.

"Question: Where was the cash from?"

"Answer. I really–I don't remember.

"Then I opened the safe. He had a safe in there and I pushed the safe and opened it and took about eight or nine thousand dollars worth of jewelry. So after I took the jewelry and the television–I don't remember whether I took a fur out of there, I might have, I believe I did, but after I got the merchandise –Well, I took it back down to Fontanna–I called Fontanna and he was not in. When I did get ahold of him he told me to meet him at his house. So that evening I went out to Fontanna's house, and I showed him all the jewelry. Him and his wife was there, and I told him, you know, pick out what he wanted, you know. So he picked out a diamond watch that hung around a lady's neck that had pearls and diamonds imbedded in it, and he picked out a bow studded with diamonds and baguettes, and he picked out a dog that had a couple of diamonds in it with a ruby, and he picked out a horse, I believe, that had a few diamonds around the horseshoe part of the wreath on it; and his wife actually picked this stuff out. He wanted to buy–except for a bracelet, –he wanted to buy for his girlfriend, he bought that hisself without her knowing about it." (TR-1775-1777).

His explanation for this obvious conflict in the testimony was that he was mistaken before the Grand Jury and that he corrected it. The United States Attorney produced no record of any correction.

Barnes further testified that the home of Aaron Bernstein was burglarized as a result of information furnished him by Appellant Klein. He testified he took a French Provincial coffee table with a

pink marble top which he traded to a person by the name of Tom Mix. He was positive that it was Appellant Klein's score or job (TR-1684-1686). On cross examination, he was equally positive that it was not Fontana's score (TR-1767). However, when confronted with his testimony before the Grand Jury that it was Fontana's score and not Appellant Klein's, he stated that he believed he corrected it before the Grand Jury (TR-1769-1770). There is no record furnished by the United States Attorney to the defense that this was corrected. The testimony before the Grand Jury, it should be noted, also contains an explanation by Barnes as to how Fontana came to give him this score (TR-1772).

Mr. Bernstein testified that he did not know any of the Appellants and had never dealt with Klein Jewelers (TR-630).

Barnes also testified that he broke into the home of a Dr. Goldberg which is located near Mrs. K's Toll House. This he said was also set up by Appellant Klein. Out of this job, he got a three-carat diamond ring, two diamond bracelets and a couple of dinner rings, and that he sold all this to Klein immediately (TR-1697-1700). He stated that this job was one of seven or eight names given to him by Klein at the time (TR-1944).

On cross examination, he could not recall whether Klein bought all the jewelry or just some (TR-1945). He denied that this job was set up for him by another jeweler and that he did not sell any of that jewelry to Klein (TR-2009, 2033). He could not recall his testimony before the Grand Jury that the most successful score that he made from Nyberg (Carr's Jewelers) was a doctor out in Silver Spring by the name of Goldberg in which he got $30,000 worth of jewelry which was all bought by a man by the name of Schreiber (TR-2033-2035).

Barnes further testified that Klein gave him 100 houses to burglarize (TR-1640), although at one point, he testified Klein gave him

200 houses. Among these was one involving a man by the name of Louis Taff, which Barnes testified he burglarized on two occasions, each occasion being given to him by Klein. He described in detail how he broke in on each occasion and what he obtained. He broke in the second time because Klein told him that he knew the man had jewelry and that he should go in and get it (TR-1745-1749).

On cross examination, he could not deny that he had testified before the Grand Jury that he only went into this house once, and that he did not know who burglarized the house the first time (TR-1754). Louis Taff testified that he did not know Appellant Klein or any of the other Appellants and was not a customer of Klein Jewelers (TR-671).

Barnes further testified that Appellant Klein set up the home of a Mr. Manuel (TR-1799), a Mr. Edson (TR-1802), a Mr. Nesbitt (TR-1800), and a Dr. Bryce (TR-1795). He admitted on cross examination that before the Grand Jury or at a previous court appearance, in each of these cases, he did not remember the job or who gave it to him (TR-1797, 1801, 1804, 1808). There are other similar instances in the record. As a matter of fact, during the first three days of testimony in the Court below, the prosecution called 44 witnesses who testified that their homes had been broken into during 1964 and 1965. 41 knew none of the Appellants and had never dealt with Klein Jewelers. It is further a fact in the record that of all the set-ups allegedly furnished by Appellant Klein, only three of the houses broken into by Barnes were in fact customers of Klein. These three will be discussed shortly.

Barnes testified that he burglarized the homes of Lauxam (TR-1534), Cammack (TR-1536), Abelman (TR-1537), Carozza (TR-1537), Libby (TR-1499-D), Dr. Thomas (TR-1499-E), Margaret Campbell (TR-1499-F), Kline (TR-1499-I), Wentz, Hailey, Rock

(TR-1499-I), McCallum (TR-1499-J), Parker (TR-1464), Abe Goldberg (TR-1464), Mrs. Coyne (TR-1923), O'Sullivan (TR-1502), Gorske (TR-1543), Scrivener (TR-1544), O'Bryant (TR-1499-G), but at no point did the government tie these homes into any of the Appellants, either by way of setting up the jobs or receiving any of the property, even in a general sense. Yet many of these victims were called as witnesses to testify as to the burglaries. In a number of cases, Barnes denied even having committed the housebreakings. See e.g. Fred Smith (TR-1540), Travis Brown (TR-1541), Nitze (TR-1561). In some instances, the prosecution made no effort to tie in the burglarizing of the homes of the witnesses called. The parade of witnesses was objected to by the defense on the ground that it would prejudice the defendants but the government assured the Court that they would be connected up (TR-601). As indicated, many were not.

The government at the trial took great pains in going through the records of Klein which had been seized. For example, the prosecutor asked whether the records of Klein Jewelers contained the name of Bernie Taff (not the same as Louis Taff who testified he was not a customer of Klein), Mrs. Nat Miller, Meyer Koonin, S. Kreiger, Arnold White, Julius Goldstein, S. C. Bassin, Josephine Allen, James Burke, Ida Sullivan (not the one whose house was broken into), Stanley Sonneborn, Victor Abdow, Lillian Pilzer, A. B. Vincent. When objection was made to the presentation of this evidence to the jury, the prosecutor advised the Court that it would be tied in with the case and that there would be some materiality to the testimony (TR-1090 et seq.). At no time did the prosecution tie any of these names into the case on trial.

The name Victor Abdow, a customer of Klein's, was brought into the case by the prosecutor, but eliminated on cross examination. On direct examination, Barnes was asked to whom he sold

the mink coat which he stole out of the Burka house. The answer was "Vic, the flower man". Then the following occurred:

> "Question: Where was Vic, the flower man located?
>
> "Answer: I believe it is 18th and Columbia Road, N.W.[9]
>
> "Question: Who if anyone had told you about Vic, the flower man?
>
> "Answer: Henry.
>
> "Question: And when you say Henry, you mean–
>
> "Answer: Klein.
>
> "Question: Very well, Sir. Now, as regards Vic, the flower man, can you tell us what Klein told you about Vic, the flower man, before you brought the coat for sale?
>
> "Answer: He told me he was good for me to meet and he wanted a coat.
>
> * * *
>
> "Answer: . . . and I told him (Klein) that I had burglarized the Burka home when he was talking to me about selling the coat." (TR-1367-1369)

Again the prosecution asked Barnes: "The time you sold the coat to Vic, the flower man, can you tell us what the defendant Klein told you concerning Vic, the flower man, as to how he knew him before you sold the coat to him?" And Barnes answered: "He told me he was a right-o and a customer–he was all right," and that when Klein told him this, Barnes was in his jewelry store (TR-1416).

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[9]This happens to be across the street from the Ontario Theater owned by Mr. Burka.

On cross examination, however, Barnes testified that Klein did not tell him to go up and see Vic, or that he was in the market for a coat, but that "Dum-Dum" had told him to do so, and that he had never testified in answer to the prosecutor's questions that Klein told him anything about selling Vic a fur coat; that Appellant Klein did not arrange for him to sell the coat to Vic (TR-1850-1851). The record discloses that Vic, the flower man, is Victor Abdow. Barnes denied talking to anyone about his testimony after finishing direct examination (TR-1852).

Just prior to the foregoing cross examination, which was at the beginning of Court one morning, counsel for Appellant Klein called the Court's attention to the fact that *at his request* he had received additional pages from the Grand Jury minutes just the day before, which revealed to counsel for the first time, that Barnes had told the Grand Jury that "Dum-Dum" had arranged for the sale of the fur coat to Vic, the flower man, and not Klein; that he did not believe the Court had read all of the Grand Jury minutes of Barnes' testimony, and that counsel should be permitted to read all of the testimony of Barnes before the Grand Jury. The Court conceded that it had not read all of Barnes' testimony but stated that much of his testimony involved people completely unrelated to the trial, and not connected with this case in any way.[10] Thereupon, the foregoing occurred:

> "Mr. Margolius: The unfortunate thing is that the relevancy of the name or a name may not be known to the court because, after all, the court doesn't know the details of the trial except as it hears it unfold in the courtroom.

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[10] As it might be assumed, for example, that the testimony with respect to Dum-Dum and Vic, the flower man, would be unrelated to this case.

"The Court: You sound like Mr. Justice Fortas in the Dennis case.

"Mr. Margolius: I don't know if I do or not but I think this is true.

"The Court: I think he says in substance that only the defense attorney can evaluate or determine whether something is material and relevant.

"Mr. Margolius: I think as a practical matter this is so.

"The Court: On the other hand, you must show a particularized need under the same decision in the Dennis case. Frankly, I think you have been given quite a bit more than under the usual procedures that you would be entitled to.

"Mr. Margolius: I would like to comment on one thing: I think I have demonstrated the need on my cross examination of Barnes." (TR-1818-1823).

The Court did not allow defense counsel to examine all of Barnes' testimony before the Grand Jury.

Barnes testified that Klein discussed with him breaking into the home of one Bob Hollander. Klein told him that Hollander was interested in boats, that he had a safe in the house, that he collected silver dollars, and that he had a large sum of money in the house (TR-1545). On cross examination, he admitted that he had told the Grand Jury that the same information had been given to him by Detective Denham, no mention being made of Klein (TR-1810).[11]

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[11] As will appear from the record in the case of Wallace v. United States pending in this Court, this testimony was given by Barnes against Denham in the trial of that case, there being no indication that the information had been furnished by Klein. Denham was acquitted in that case.

Barnes testified that he had also been given the name of Kay Glazier by Klein. Kay Glazier was a customer of Klein's. Barnes stated that Klein told him that Mrs. Glazier was not usually home in the afternoons, and that he could make the house at that time. Barnes testified that he (Barnes) phoned on numerous occasions until he finally was able to ascertain on a given date that she was not at home. He then went to the house, burglarized it, and stole a man's watch, a full length black-dyed mink coat, two television sets and some odds and ends of jewelry. He sold the merchandise to certain people, the identity of whom he recalled. He did not sell anything to Appellant Klein; nor did Klein get anything out of the deal. He did not recall stealing any rings out of that house and no mention was made of a diamond watch or a ladies' gold watch (TR-1647, 1976). He also testified that he did not steal a mink stole but would have if he had seen it.

On cross examination he denied, contrary to his direct testimony, that he had told any investigator that it was Klein and not he, who had called Mrs. Glazier and gotten an answer that "this is Joe's Pool Hall" (TR-1840). On the day that he broke into the Glazier house, he personally called on the telephone in the afternoon and found that nobody was home, as no one answered the phone. He was sure that he was the one that called (TR-1977).

Barnes identified Mrs. Glazier as the person he previously referred to as Gloria Coy (TR-1840). Contrary to his testimony about Mrs. Glazier's being away socially every afternoon, he did not deny testimony before the Grand Jury that Klein had told him that Mrs. Glazier was going on vacation with her family, and that Klein called him immediately to advise him of that, "so the next day, I went back down to the jewelry store and Henry called Gloria Coy right from the jewelry store, and he asked when the girl answered the phone, Henry looked at me and scratched his head and said

'That broad is nuts–she said this is Joe's pool hall' you know, but he said he got the right number . . . so a couple more days went by, and Henry called again, and he never got no answer while he was in the store so I drove on out there and I took Eddie with me on this day and when we got out there, well, there was nobody home". So he went on and burglarized the house.

Mrs. Glazier was called as a witness and she testified that (1) she was generally home in the afternoons because she had children, (2) on the day that her house was broken into, she had visited Klein's jewelry store and had told him that she was going out to visit a friend who had just come home from the hospital, (3) that Klein had her phone number, which was unlisted, and (4) that on arriving home, she discovered that her house had been broken into and that her mink coat, husband's watches, her diamond wrist watch, gold ladies' watch, a turquoise ring and television set had been stolen. She also testified that Klein had seen her fur coat and had admired it. She also verified the fact that she had received unusual phone calls "all hours of the night and day" for a period of two weeks.

On cross examination, she testified that her mink stole was in the closet right next to the mink coat that had been stolen so that anyone could have seen it. She could not state precisely why she was in Klein's store on the day of the burglary, that on the day of the burglary she was wearing a gold watch and that she did not know if the beauty shop where she had her hair fixed that day had her phone number (TR-1965 et seq). She also testified that the beauty shop she went to was Vincent et Vincent.[12] She also testified that she had heard that a friend of a friend of hers had her

[12]Marcia Skeens, wife of Skinner Skeens and friend of Barnes was an employee of the Vincent et Vincent chain at the time (TR 5911-12). The beauty shop may have had her phone number (TR. 5884).

stolen coat, that it was recovered but she refused to accept it back, having received the insurance money (T R-5895).[13] She testified further that Oliver 4-0982 (the telephone number of Mrs. Glazier listed in the records of Klein Jewelers) was an old unlisted phone number which could have been changed as long as three or four years earlier (T R-5899. See also T R. 6004).

After Mrs. Glazier had testified, and during the defense, the prosecution tendered to counsel for Klein a statement made by agents of the F B I following an interview with Mrs. Glazier shortly after her home had been burglarized on July 28, 1965. Agent Marquise was called and testified that he had investigated the Gittelson case (a Klein customer) and the Glazier case. He testified that he had asked Mrs. Glazier during that interview whether or not she had been in Klein's store on the day of the housebreaking. She stated at that time that, contrary to her direct testimony, she could not recall if she had been in there on that particular day (TR -5904).

Barnes testified that he broke into the Gittelson home at the suggestion of Appellant Klein, who told him that Gittelson was going on a vacation to Florida. He testified that the property stolen was not sold to Klein[14] Gittelson was called as a witness, and testified that he had been a customer of Klein and that he frequently visited the store, particularly before he went on vacation to Florida, that he advised Klein that he was going on vacation to Florida, and that when he returned home, he discovered that his home had been broken into.

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[13]The husband of Mrs. Glazier was called as a witness by the defense. He admitted that he knew Skinner Skeens personally (TR 5669). An employee of Vincent et Vincent testified that on the day of the burglary, Mrs. Glazier was wearing her diamond watch.

[14]Barnes refused to discuss with the F.B.I. who he had sold this property to (TR. 5631).

On cross examination, he stated that he remembered very clearly that he had told Klein where he was going, yet he could not tell the jury in which hotel he had stayed (TR-822). FBI Agent Marquise was called by the defense and testified that Barnes told him that Klein advised Barnes that Gittelson would be out of town, as he was going to *New York* (T R-5631, 5903). The agent further testified that Barnes refused to discuss with him who had gotten the property in the Gittelson case.

Barnes testified that he broke into the apartment of a Mrs. Veccione in the River House in Virginia. This was the third of the three customers of Klein whose homes had been broken into by Barnes. This housebreaking took place in January of 1965, and it occurred on the day that Klein told him to do it, though he had discussed this with him the latter part of October or the first of November. He got several cheap rings, a pearl necklace, and a gold mesh necklace with a $20.00 gold piece attached. Also, about twenty cheap items of jewelry. It had a total value of about $2,500.00, and he sold it all to Klein for about $300.00. Klein had told him that Mrs. Veccione had her jewelry insured for $25,000 and that he should commit the burglary when the insurance went into effect, Barnes wanted to go back a second time because he wanted to get a diamond ring which Mrs. Veccione had, as he had a sale for it to somebody (not Klein). (TR 3002) Klein told him, however, that Mrs. Veccione had put in a burglar alarm system in her apartment, and for him not to go back (TR-1313-1318). He further testified that in February, he wanted to buy back the $20.00 gold piece necklace, but Klein advised him that he had disposed of it.

The prosecution recovered from a customer of Klein's a gold mesh necklace with a $20.00 gold piece which was shown to Barnes, who positively identified it as the necklace he had stolen from River House. (TR. 1399) On cross examination, and with permission of the Court, counsel for Klein showed Barnes a different gold mesh

necklace with a $20.00 gold piece attached, similar to the one he had identified as having stolen, and he likewise identified this second necklace as the one he had stolen. (TR. 1738) Mrs. Veccione testified that she had examined the necklace that the prosecution had shown Barnes, and that she could not identify it, as it was not similar to the piece she had (TR-4506-7) Witness Otis Diggs, a salesman in Klein's store testified that these necklaces were regular stock and were displayed in the window, where Barnes might have seen one (TR. 5945)

Barnes testified that although Klein gave him the name and phone number of Mrs. Veccione, Klein did not get the phone number from his records, but from the phone book. In testimony before the Grand Jury, Barnes identified Mrs. Veccione as Mrs. Willcox, not Veccione.

The government produced no property of any kind or description which had been sold to Klein by Barnes, and none was recovered from Klein. On the other hand, there was testimony that some of the jewelry stolen from the Bastedo house had been recovered from Fontana. (TR. 1002)

Barnes also testified that he gave many items of stolen merchandise to the girl with whom he was living, including a coat and items of jewelry. At the same time, he admitted that he bought jewelry legitimately from Klein to give to her as well as to other people.

Barnes also testified that when he broke into the Burka house and found no jewelry and discovered that he had the wrong house, he went to Klein complaining that he needed some good scores, as he needed the money. (TR. 1368-9, 2001) On another occasion, he testified that the reason he did not go back to the right Burka house was because he was busy with a lot of jobs out of town, and

that a house with only $15,000 worth of jewelry in it was not big enough for him to bother with. (TR 1883-1885).

He further testified that he, Skeens and two other men, went to the Bahamas for the purpose of stealing the McLean diamond. He testified that he stole it one morning when he discovered Mrs. McLean and her daughter were in the coffee shop having breakfast. He then went to her room and lifted the stone (TR-1282). Before the Grand Jury, however, he testified that he stole the diamond while Mrs. McLean was playing gin rummy (TR-1933-1934). He testified that when he brought the diamond back, he took it to Klein to see if he would purchase it. Klein stated that he could not offer more than $15,000 for it (TR-1283-1284). Agent Marquise of the FBI testified that he had investigated the theft of the diamond, and in discussing it with Barnes, he did not mention anything at all about Klein's participation in that theft. (TR-5614). He did mention that he had received an offer of $12,000 for the diamond from Carr's Jewelers, as well as one from another jeweler in New York. He did not mention Klein (TR-5641-5642).

Appellant Tavenner, according to Barnes, helped guard the diamond, and when it was sold received, according to Barnes, a small cash payment (TR 1402).

Barnes testified that he was responsible for the theft of a large number of furs from the "French Poodle" shop in Washington. Appellant Hamilton assisted him in this job. All the furs were removed to Maryland where they were stored in a garage of the sister of Xydas. Barnes further testified that Hamilton obtained one of these furs, and that on a Sunday shortly after the theft, Appellant Klein and his wife were taken by him from Skeens' home to the garage, where Mrs. Klein selected several fur stoles or jackets. She never received any coat.

On cross examination, Barnes testified that he had purchased jewelry from Klein from time to time, some on credit. He also admitted he had brought a fur coat to Klein's store.

At the commencement of the trial, the government announced that it proposed to introduce tape recordings of certain telephone conversations and certain face-to-face conversations which Appellant Klein had with Skeens and his wife, Marsha Skeens. Appellant Klein moved to suppress these recordings and objected to the use of them in evidence, as well as to any testimony concerning such conversations. The basis for the objection was that such recordings, as well as conversations, were a violation of Appellant Klein's constitutional rights under the 4th, 5th and 6th Amendments, that any consent given by Skeens or his wife to the disclosure of telephone conversations was not voluntary under the Federal Communications Act, and that one face-to-face conversation recording at least, was unintelligible. Appellant Klein also objected to the use of such recordings without the parties to the conversation, namely Skeens and his wife, being called to testify before the jury with respect to them. The Court heard testimony out of the presence of the jury, and admitted into evidence four tape recordings, and excluded the fifth as being unintelligible. However, the Court permitted police officers to testify to what they had heard while the conversation was being carried on.

Although the tape recordings were allowed in evidence and repeatedly played to the jury, Appellant Klein maintained that he was not involved in any illegal dealings with Barnes. Certain equivocal statements were used by the prosecution to indicate Klein's participation with Barnes. In testifying on his own behalf, and not having heard the tape recordings prior to the time of trial, Klein explained what he may have meant by these equivocal statements. With respect to the face-to-face conversations with Skeens, which

was testified to by the officers without the benefit of a tape, Appellant Klein according to the officers was more unequivocal, admitting that he had gone to a garage and obtained furs. Klein derived the truth of this testimony unequivocably. A careful reading of the testimony of the police officers, of the Court reporter's transcript of the tape recordings, and of the testimony of Appellant Klein, discloses, as will be hereinafter more fully discussed, that the conversations can be interpreted not unfavorably to Appellant Klein.

At the conclusion of the government's case, the Appellants moved for a judgment of acquittal, which was denied. This was renewed at the close of the case, and was again denied.

Appellant Klein testified in his own behalf that he has been a jeweler in the District for twenty-five years, and that he knew Barnes as a customer who frequented his place of business, and had made purchases of jewelry. He also knew Skeens and Mrs. Skeens as customers (TR. 6015). As a matter of fact, he had become friendly with Mrs. Skeens so that during the period when Barnes was discussing his criminal activities with the U.S. Attorney and was involving Skeens, Mrs. Skeens had from time to time talked to Appellant Klein about her husband's involvement. Consequently, when she spoke to him on the occasion when the conversations were taped, he already knew of her concern for her husband, and many of his statements in the recordings were generated by a desire to assist her in her problem.[15] He testified that he had, on an earlier date, when speaking with Mrs. Skeens, advised her that he had received a fur coat from Barnes which he had taken at his store in trade as payment for an indebtedness which Barnes owed him, not

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[15]In the tape recording of November 29, 1965, Mrs. Skeens says she was worried about her husband, *not Klein*. Klein suggested that she be careful about talking on *her* telephone. He did not have any concern over *his* phone being tapped.

knowing that such fur coat was stolen. (TR. 6031) Consequently, when on the tape recording, she asked him what he had done with the furs, he made the statement which he did. See Klein's testimony beginning at page 6034 of transcript.

Appellant Klein denied absolutely and positively any involvement with Barnes, (TR. 6014) and explained that it was possible that Barnes was in his place of business when some customers were there or came in, and could have obtained information with respect to these customers at such time. As a matter of fact, Klein stated that he frequently introduced customers to each other, and showed jewelry of customers to other customers as a matter of pride. He recalls an incident when a customer by the name of Dicker, a flamboyant type, came in with his partner, wearing a very large and unusual ring. Barnes was there at the time and asked him who the customer was. He proceeded to identify him and told him something of the man's background (TR. 6021-6027).[16] In this sense, he testified he might have given Barnes several names. He also testified that his place of business was very small, and that he left appraisal books, jewelry envelopes, and other records around which could be seen by customers if they desired to look. (TR. 5993 et seq.) In the taped conversations Klein said the very same thing.

Klein further testified, contrary to Barnes, that he had never received any television set from him. Barnes claimed to have sold Klein a set to be given to his daughter. A television wholesaler was called on behalf of Klein, who testified that during this period of time when Barnes was supposed to have sold TV sets to Klein, that Klein purchased several sets from him (TR-6373).

Klein denied any involvement in the specific cases involving his customers. With respect to the Glazier case, he identified from his

[16] In the tape recording of December 10, 1965, Klein was asked by Mrs. Skeens who a certain customer in the store was and he identified him by name. (TR. 5236-E). This could have happened with Barnes. See Barnes' testimony (TR. 3025-27).

records Mrs. Glazier's phone number which was an old one. (TR. 6004). Klein testified further that he did not know Joe Nesline, whose name appeared in the records of Klein Jewelers, and which the government had made a point of calling to the attention of the jury. He testified that Joe Nesline's telephone number had been placed in his records when he was in partnership with another person, which partnership had broken up many years before. (TR. 6018)

Klein testified Barnes had introduced himself to him as a Bible salesman under the name of Coleman (TR. 5990). Barnes testified that he had in fact represented himself as a Bible salesman. (TR. 4155) Klein did not know that Barnes was involved in any way with the law until at a later date, he came into his store with a bondsman to buy a gift.

Klein called as a witness his wife, who substantiated Klein's testimony. She testified that Klein had brought her a fur coat which he had obtained from Barnes in payment of a debt, that she never liked the coat and would not wear it. She took it to a furrier on Connecticut Avenue, whom she identified by name, where she left it. This furrier was never called as a witness by the government to refute Mrs. Klein's testimony either as to date or circumstances. Mrs. Klein also gave testimony, and other witnesses were called (an employee of a fur shop[17] and a dressmaker[18]) which substantially explained some of the taped conversation between Appellant Klein and Mrs. Skeens. (TR. 5764 et seq.)

Appellant Klein also called Otis Diggs, an employee at his store, who testified that he had worked for Klein all during the period in-

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[17]Mrs. Lobley, (TR. 6384).

[18]Christine Theoharis, (TR. 6382).

volved, and that he had never seen anything going on between Barnes and Klein. He later testified that Klein was careless in the handling of his books and records, and frequently left his appraisal books and customers' jewelry envelopes lying around where visitors to the store could see and read them. (TR. 5941) He attested to the reputation of Appellant Klein, for honesty, integrity, truthfulness and veracity. He further testified that the necklace with the twenty dollar gold piece which Barnes had identified as having been stolen from Veccione (although he identified two different ones as being the same) was a stock item in Klein's store and was not unique.

While on the witness stand, witness Diggs testified that on two occasions prior to the date of trial, he was advised by the U. S. Attorney's office that they would get him a job if he lost his job at Klein's. One of these was a telephone call from Assistant U.S. Attorney Harold Sullivan so advising him. A day or so before he was called as a witness to actually testify in court for the defense, he was approached on the street by a police officer assigned to Mr. Sullivan's office and again offered a job. (TR. 5948 et seq.) The U. S. Attorney at trial did not dispute this testimony.[19]

Appellant Klein called witnesses of unquestioned character, who testified as to Klein's reputation, for honesty, truthfulness and veracity. One of these, an instructor at the Washington Police Academy since 1941 and a jewelry appraiser for the Police Department, stated "I would say he rates as high as anybody in the city that I have

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[19]The U.S. Attorney's motive in offering a defense witness a job is frankly not clear to Appellants. It is suggested, however, that it has some relevancy on what motivated Mr. and Mrs. Skeens to cooperate with the U.S. Attorney and to consent to have telephone and face-to-face conversations monitored and recorded by the police.

come in contact with" (TR-5760). See also TR-5601, 5607, 5616, 6251.

With respect to Appellant Riggin, the only testimony was that of witness Barnes, who testified that Riggin had informed him that one Sara Kotz had cash in her apartment and that he, Barnes, had stolen the money and had given Riggin part of it. There was no corroboration of this involvement of Riggin. Sara Kotz knew nothing except that someone had stolen her money, and that Riggin's mother knew Mrs. Kotz. Riggin was also accused by Barnes in connection with the housebreaking of the house of George Sharman. Barnes stated that Riggin had told him that there was money there and that he entered the premises and found about $300.00. He gave half of it to Riggin. Again, there was no corroboration.

With respect to Appellant Travenner, Barnes' testimony implicated him in only three matters. The Bastedo housebreaking and the McLean diamond theft have hereinabove been discussed and the inconsistencies in Barnes' testimony have been noted. The third and last charge made by Barnes against Tavenner was the housebreaking into the home of one Nader. Barnes testified that he broke into Nader's home as a result of information from Tavenner. There was no corroboration of Barnes' statements as regards Tavenner's involvement.

The government tried unsuccessfully to elicit from Barnes that these two Appellants, Riggin and Tavenner, were part of the agreement that Barnes said he had with the Appellant Klein—that Klein would give him addresses to break into and then he would sell the jewelry to Klein. This is best shown by Barnes' testimony on page 1351 of Volume 9 testimony.

> "Q. Can you tell us whether any of those three individuals participated in any way with this working arrangement you had with Klein?

A. I don't know what you mean by participated with me.

Q. All right. Mr. Barnes, what I mean is this: Can you tell us, first of all, what the defendant No. 2, Earl Tavenner's role was in connection with that arrangement with Klein?

A. Well, he knew that Henry was setting up scores for me and that I was selling the jewelry to Klein and the scores he set up I would sell the jewelry to Klein, too, if he wanted it.

Q. When you say if he wanted it, do you mean Klein or Tavenner?

A. If Klein wanted it.

Q. Next, can you tell us what the role of the defendant Riggin was, defendant No. 3?

A. He knew that Henry was setting up scores for me.

Q. All right, sir."

Appellant Hamilton did not take the witness stand. The testimony against Hamilton was to the effect that he broke into places with Barnes, among which were a Greek Church and "The French Poodle" and that he assisted Barnes in transporting the furs stolen from "The French Poodle" from the District of Columbia to Maryland. With respect to "The French Poodle," which was the subject of the fourth count of the indictment, Appellant Hamilton was acquitted. With respect to the Greek Church theft, and in order to tie it into the conspiracy, the government introduced into evidence the identical testimony which it had previously used against Appellant Hamilton in convicting him of the substantive crime (for which he had been separately indicted), from which conviction Hamilton has appealed to this Honorable Court (Appeal No. 21388). There was no testimony that Hamilton or any of the other Appellants had entered into a common agreement or conspiracy to engage in a con-

tinuous course of conduct as alleged. As in the Greek Church case, the government attempted to prove the commission of isolated substantive crimes, none of which was tied together by any evidence of a conspiratorial agreement.

STATUTES AND RULES INVOLVED

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

D.C. Code § 22-2201. Grand larceny.

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

D.C. Code § 22-2205. Receiving stolen goods.

Any person who shall, with intent to defraud, receive or buy anything of value which shall have been stolen or obtained by robbery, knowing or having cause to believe the same to be so stolen or so obtained by robbery, if the thing or things received or bought shall be of the value of $100 or upward, shall be imprisoned for not less than one year nor more than ten years; or if the value of the thing or things so received or bought be less than $100, shall be fined not more than $500 or imprisoned not more than one year, or both.

D.C. Code § 22-108. Offenses committed beyond District of Columbia.

Any person who by the commission outside of the District of Columbia of any act which, if committed within the District of Columbia, would be a criminal offense under the laws of said District, thereby obtains any property or other thing of value, and is afterwards found with any such property or other such thing of value in his possession in said District, or who brings any such property or other such thing of value into said District, shall, upon conviction, be punished in the same manner as if said act had been committed wholly within said District.

18 U.S. Code § 2314. Transportation of stolen goods.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

47 U.S.C. § 605. Unauthorized publication or use of communications

". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any

part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto . . ."

Rule 28, Fed. Rules Cr. Procedure

(a) Expert Witnesses. The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party.

SUMMARY OF ARGUMENT

I

Appellant Klein's business premises were subjected to a search under a warrant issued by the United States Commissioner. As a result of this search, voluminous records of many descriptions were seized, including records of transactions occurring after the alleged conspiracy had terminated. The search was conducted and the records seized without any effort to study or analyze the records being taken. The warrant covered all books and records, etc. "maintained in the furtherance of the conspiracy". This warrant was too broad,

and did not particularly describe the things to be seized, making it a general search, condemned by *Stanford v. Texas* 279 U.S. 476 and *Marron v. United States*, 275 U.S. 192, 196.

Appellant's motion to suppress and his objection to the use of the records should have been sustained. Such action on the part of the Trial Court constitutes reversible error.

II

The lower court denied Appellants' motion for a psychiatric examination of Barnes. In light of the testimony of Barnes in the prior case of *Wallace et al v. United States*, now on appeal to this Court, and of the record, such examination should have been ordered to determine Barnes' mental capacity as a witness. The use of psychiatric testimony to impeach the credibility of a witness is a sound practice and the Court should have permitted Barnes' examination.

III

The Trial Court permitted defense counsel to examine and use parts of the Grand Jury testimony of the government's principal witness. The Trial Court acknowledged that it had not read all of the witness' testimony before the Grand Jury, and denied defense counsel's request to examine all of the testimony themselves with respect to relevancy and materiality. This case turned upon the credibility of witness Barnes. The Trial Court's action in denying Appellants the right to examine the Grand Jury minutes constitutes reversible error under *Dennis v. United States*, 384 U.S. 855.

IV

The Court permitted the government to introduce into evidence four tape recordings of telephonic and face-to-face conversations be-

tween informers and Appellant Klein. The informers were not called as witnesses to testify before the jury. In addition, the Court permitted police officers to testify as to what they heard in a monitored conversation which was inaudibly taped. Appellant's contentions below as well as in this Court are (1) that under the recent cases of *Berger v. New York,* 388 U.S. 41 and *Katz v. United States,* 389 U.S. 347, electronic surveillance by police officers under the circumstances of the present case is no longer admissible and that the earlier cases of *On Lee v. United States,* 343 U.S. 747, and *Lopez v. United States,* 373 U.S. 427 are of no further force and effect; (2) That the informers, parties to the conversation, were available and should have been required to testify, and (3) with respect to the telephonic conversations, these were improperly admitted on the basis of *Weiss v. United States,* 308 U.S. 321, holding to the effect that consent to interception or divulgence of a telephone conversation by one of the parties thereto must be made freely and voluntarily, without express or implied threat or promise. In the present case, the record will disclose that the consent given by the informers was not voluntary within the meaning of the law. *Laughlin v. United States,* (D.C. D.C. 1963) 22 F.Supp. 264.

V

The proof in the present case establishes that Barnes was not engaged in one conspiracy but in many. The inferences properly drawn from the evident do not justify the conclusion that there was only one conspiratorial agreement. Barnes engaged in many housebreakings and utilized the assistance of numerous persons in his individual crimes. The government's attempt to bring all of these housebreakings into a single conspiracy was grossly prejudicial to each of the Appellants, and denied them a fair trial. See *Kotteakas v. United States,* 348 U.S. 750. Mere knowledge by A that B is engaged in a conspiracy with C does not render A a party to that con-

spiracy, nor do his individual activities with one of the conspirators make him a party thereto, unless he acts in furtherance of that particular conspiracy.

Moreover, in the present case, the government grossly prejudiced each of the Appellants when it introduced proof of crimes, some of which were not admitted by Barnes and many of which, while admitted by Barnes and many of which, while admitted, had no connection with any of the Appellants.

VI

The government's use of tape recordings against Appellant Klein prejudiced the other Appellants, and denied them a fair trial. These tape recordings made mention of the other Appellants and, although the trial court instructed the jury that they were not being admitted against the other Appellants, and were not to be considered by the jury as such, the use of such tape recordings was fatal under the case of *Bruton v. United States*, 391 U.S. 123.

VII

The main thrust of the government's case against Appellant Hamilton involves the so-called Greek Church. Hamilton had already been tried and convicted of the substantive crimes involving this particular place. The evidence introduced in the Court below was identical with the evidence used at the earlier trial. This was prejudicial.

VIII

While the jury was deliberating, they requested of the trial court to hear the testimony of Barnes before the Grand Jury. The trial court denied this request. Thereafter, the jury requested that the tape recordings of Appellant Klein be played for them again. This the court permitted, over Appellants' objections. While ordinarily,

it is within the sound discretion of the trial court to permit the jury to hear portions of the evidence requested by them, it is submitted that such discretion is abused when the court permits them to re-hear evidence allegedly prejudicial to a defendant and denies them the privilege of hearing evidence favorable to that defendant. Due process of law requires a fair trial. In a case such as the present, where the prosecution relies upon the credibility of a witness such as Barnes, the actions of the court in ruling as it did on the requests of the jury was to over-emphasize the government's evidence and argument, vis-a-vis the contradictions contained in Barnes' Grand Jury testimony. The jury verdict should be set aside for this reason.

ARGUMENT

I.

THE SEARCH AND SEIZURE OF APPELLANT KLEIN'S PROPERTY WAS ILLEGAL AND THE PROCEEDS OF SUCH SEARCH SHOULD HAVE BEEN SUPPRESSED AND EXCLUDED FROM EVIDENCE

On March 19, 1966, the United States Commissioner issued a search warrant directing a search of premises 1009 E Street, N.W., Washington, D. C. alleging that there was then being concealed on the premises certain property, namely "any books, records, receipts, sales slips, receipt slips, repair slips, appraisal data, customer lists and related papers, documents, writings, printings, notations and related paraphernalia maintained in the furtherance of the conspiracy described in the attached affidavit and any fruits of such housebreakings, larcenies and interstate transportation of stolen property as set forth in said affidavit." In executing the warrant, members of the Metropolitan Police Department came upon the premises 1009 E Street, N.W., and seized a great quantity of papers, documents, and records of transactions many which were subsequent to the date of

the occurrences alleged in the affidavit. In addition to papers and documents, there was seized one envelope containing 15 small diamond chips which had no identification connecting the same with any transaction set forth in the affidavit supporting the search warrant.

In the affidavit attached to the search warrant it was stated that during the period of time set forth therein Robert E. Barnes was in a conspiracy with the Appellant Klein and "numerous others"; that in connection with said conspiracy Klein informed Barnes about one Betty Vecione and one Bernie Gittleson as a result of which Barnes burglarized their homes. The affidavit further stated that in carrying out the conspiracy certain records were maintained by Klein which "recorded the names, addresses, phone numbers of the customers and descriptive information pertaining to certain jewelry purchased, repaired, cleaned, appraised, and examined . . ."; and that also such written materials were kept in the ordinary course of business and were regularly resorted to by Klein in the planning of crimes intended in the conspiracy. No description was given with respect to what names, addresses, phone numbers or jewelry were being sought.

As a result of the sweeping directive of the search warrant to seize records and "related paraphernalia maintained in the furtherance of the conspiracy" the police in executing the warrant seized everything in the nature of books, records, and documents which they could find without examining the same and literally threw them into boxes for removal (Tr. 651-664). Although Appellant Klein was engaged in a going business he was left without books and records. It is the indiscriminate and unlimited search and seizure which was permitted by the search warrant of which Appellant Klein complains. As a matter of actual fact, the records that were seized, involving thousands of pages, contained very little concerning Vecione and Gittleson. One envelope marked "A. B. Vincent" which con-

tained the 15 small diamond chips was seized. This exemplifies the breadth and scope of the search and seizure, as A. B. Vincent has never been associated by Barnes at any time with any conspiracy or any other activity. What occurred was nothing more or less than a broad scale collection of all records of every nature and description which the officers could put their hands on. The return to the warrant indicates that these were collected in four boxes and several bags "containing multiple bank statements, jewelry receipts, phone numbers, bills, receipts, papers and other written, typed and printed matter." The seizure was as broad as the return indicated. As Appellant Klein stated in his affidavit in support of the motion to suppress, many of the records seized were in current use at the time and recorded transactions subsequent to the date alleged in the affidavit supporting the warrant.

The Supreme Court of the United States has held on numerous occasions, in interpreting the 4th Amendment to the Constitution, that the requirement that warrants "shall particularly describe the things to be seized makes general search under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192 at 196. See also *Berger v. New York*, 388 U.S. 41-58; *Gouled v. United States*, 255 U.S. 298; *Woo Lai Chun v. United States*, 274 F.2d 708 (9th Cir.); *Alioto v. United States*, 216 F.Supp. 48 (E.D. Wis., 1963).

The various categories described in the warrant when taken together were so sweeping as to include virtually all business records on the premises and placed no meaningful restriction on the things that were seized. Such a warrant is similar to the general warrant permitting unlimited search and has long been condemned. It is akin to the infamous writs of assistance which permitted officers at their

discretion to search premises for smuggled goods. See *Boyd v. United States*, 116 U.S. 616. In *Stanford v. Texas*, 279 U.S. 476, the Supreme Court of the United States struck down a search warrant which authorized the search and seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist party of Texas." The Court, in so doing, stated that "The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the 4th Amendment, false to its meaning, and false to its history." See also concurring opinion of Mr. Justice Black in *Marcus v. Search Warrant*, 367 U.S. 717, 738.

One cannot escape the conclusion that the officers executing the warrant in this case had no guidelines to follow, as the extent of the conspiracy was not set forth in the warrant, the persons involved therein were not named, and the books and records to be seized were not identified except in a generic way. The condemnation of *Stanford v. Texas* is applicable to the case at bar. Compare *U.S. v. Brown*, 274 F. Supp. 561 (S.D. N.Y. 1967).

If this Court determines that the evidence was illegally seized, or for that matter if it determines that any evidence was illegally seized, such evidence should have been excluded upon objection. The trial court did not do so but permitted counsel for the government to introduce from the records many names which had no relation to and were in fact never connected with the conspiracy or any substantive offense. This fact was called to the Trial Court's attention seasonably (Tr. pages 1090 et seq.).

Illegally seized evidence is inadmissible as to all defendants in a joint trial. See *McDonald v. U.S.*, 335 U.S. 451; see also *Hair v. U.S.*, 110 U.S.App.D.C. 153, 289 F.2d 894, 897; *Schoenewan v. U.S.*, 115 U.S.App.D.C. 110, 317 F.2d 173, note 5.

II.

THE TRIAL COURT SHOULD HAVE ORDERED A PSYCHIATRIC EXAMINATION OF PRINCIPAL GOVERNMENT WITNESS

Prior to trial, Appellants requested a psychiatric examination of Robert Earl Barnes. This Motion was denied. *U.S. v. Klein,* 271 F.Supp. 506.

Although the Trial Court's opinion in denying the Motion does not refer to it, one of the principal bases for urging a psychiatric examination was the prior testimony of Barnes in the case of *U.S. v. Wallace,* et al CR. No. 486-66 (now on appeal in this Court). The Trial Court had before it a copy of the transcript. In the prior trial, the witness Barnes had made numerous statements, which, like in case at bar, were contradicted by credible testimony, and prior inconsistent statements of his own. As an example, Barnes testified at that trial that he was arrested by Detective Rogers at his home on 19th Street. The records of the Police Department were introduced to show that he surrendered at the 14th precinct, which was on the opposite side of town, an inconsistency which might have indicated the testimony of a psychopathic liar. The very record in the present case, as demonstrated in the Statement of Facts herein, indicates that we may be dealing with a psychopathic liar, or one suffering from a mental aberration.

The existence of insanity or mental derangement is admissible for purposes of discrediting a witness. The use of psychiatric testimony to impeach the credibility of a witness is sound. 3 *Wigmore, Evidence* (3rd Ed. 1940) §§ 931, 932, 935, 997(b). See also *U.S. v. Hiss,* 88 F.Supp. 559 (S.D. N.Y., 1950); *Taborsky v. State,* 116 A.2d 433, ___ Conn. ___; *State v. Butler,* 143 A.2d 530, ___ N.J. ___.

In the case of *State v. Butler, supra,* the Court stated:

> "The trial of a criminal cause is a quest for truth and justice, not merely a contest for a tactical advantage over an adversary or for a favorable verdict irrespective of its relation to the basic objective of the proceedings. When reasonable ground for doubt as to a person's mental capacity as a witness becomes known to the parties and to the court, and lives may depend upon his testimony, the proper administration of justice in the public interest ought to stimulate a cooperative voluntary effort to establish a means of mutual solution of the problem."

The lower court in referring to adjudicated cases indicated that psychiatric examinations have been permitted principally in sex crimes, "but there is no reason to restrict this attitude to sex crimes. Whenever a psychiatrist can expose a personality disturbance that may affect a witness' credibility, the policy of admitting any relevant material demands that he be heard.[20]

It has been suggested that trial courts might impose a medical examination as a condition of allowing a witness to testify. *Goodwin v. State,* 114 Wisc. 318, 90 NW 170, 171.

Rule 28 of the Federal Rules of Criminal Procedure permits appointment of experts by the court.

In the present case, there is no question that some of what witness Barnes testified to was true. For example, he did in fact break into and burglarize many of the homes admitted by him. There are many other areas, however, where his truthfulness is suspect. Can one believe, for example, that Appellant Klein provided him with

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[20]Note, *Psychiatric Evaluation of the Mentally Abnormal Witness,* 39 Yale 1324, 1339 (1950). See also 21 Fed. Rules Decisions 204.

names of eight persons in the neighborhood of 5000 block of Tilden Street, N.W., whose homes were all broken into on or about the same date, February 16, 1964, none of whom knew Klein, or any other appellant, none of whom dealt at Klein's, and from which housebreakings neither Klein nor the other appellants benefitted. The several versions of Barnes' burglary of the Sonneborn apartment, for example, are so grossly inconsistent as to be incredible. Before the Grand Jury, Barnes testified that Detective Denham had nothing to do with the Sonneborn job and received nothing from it.[21] At the trial, his story was that Detective Denham arranged for him to do the job and that Denham gave him $5,000 out of which he gave Denham $1,000.00.[22] These bizarre versions are related on Pages TR 2036, 2056-2099. Barnes' capacity to remember minute details of what he obtained from the various housebreakings amplifies the gross inconsistencies with respect to the various versions of who was implicated. All of this indicates a witness suffering from some mental derangement. It is submitted that it is more than pure fabrication. What it is only a psychiatrist would know. The opportunity should have been afforded the defense to have Barnes examined by one.

It is respectfully submitted that Appellants were prejudiced by the denial of their motion for a psychiatric examination of the witness Barnes.

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[21] Sonneborn was a customer of Klein. Barnes testified, however, that Klein had no connection with this transaction (TR. 1468-9). Compare, however, the United States Attorney's representation to the court that Klein did have a connection with Sonneborn as justification for introducing Klein's records (Tr. 1090-1091).

[22] As this Court knows from the record in Wallace v. U.S., Appeal No. 21134, Detective Denham was acquirred of any wrong-doing as was Detective Rogers.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANTS OPPORTUNITY TO EXAMINE GRAND JURY TESTIMONY OF BARNES

During the course of the trial, the U. S. Attorney furnished to the defense numerous pages of the transcript of witness Barnes' testimony before the Grand Jury. The determination of what was to be turned over to the defense was, in the last analysis, made by the U. S. Attorney. The procedure followed in this case was for the U. S. Attorney to deliver to the Court what he considered to be material and relevant, which in turn, upon the Court's approval, was delivered to the defense. The defense was not permitted to read the testimony of Barnes for the purpose of determining possible relevancy or materiality, but had to be content with what was offered.

On several occasions during the trial, defense counsel requested the opportunity to read all of Barnes' testimony, which was denied.[23] As appears from the portion of the transcript contained in the Statement of the Case (TR-1818-1823), counsel for Appellant Klein, realizing that some pertinent Grand Jury testimony concerning the sale of a fur coat to Vic, the flower man, was not in his possession, he received, at his request, some additional pages of the Grand Jury minutes. He thereupon advised the Court of what these pages disclosed and of their great materiality, and stated to the Court, "I don't think your Honor has read all the Grand Jury minutes of the testimony of Barnes, but I feel it only fair . . . that we as officers of

[23] At a preliminary hearing to determine the admissibility of tape recordings, and in connection with Appellant's contention that Marcia Skeens' consent to the divulgence of monitored telephone conversations was improperly motivated, counsel requested an examination of the Grand Jury testimony of Barnes (TR. 225). Of course during the trial itself the question of consent having been resolved would have no place in the testimony presented to the jury.

the Court, in light of the revelation made by this Grand Jury—these Grand Jury minutes which were furnished to us originally and but for our request to fill in some of the pages that were not filed—or filled in, we would not have this and that we should be permitted to read all of the testimony of Barnes before the Grand Jury" (TR-1819). Counsel also asked the Court, pointedly, "May I inquire of the Court whether the Court itself has read all of Barnes' testimony". The Court stated that he did not think so (TR-1820). When counsel stated that the unfortunate thing is "that the relevancy of the name or a name may not be known to the Court because, after all, the Court does not know the details of the trial except as it hears it unfold in the courtroom", the Court remarked: "You sound like Mr. Justice Fortas in the Dennis case" (TR-1822).

It is submitted that counsel for Appellant Klein did sound like Mr. Justice Fortas in the case of *Dennis v. United States* 384 U.S. 855, for in that case, Mr. Justice Fortas, speaking for the Supreme Court on this point stated as follows:

> "Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' *Pittsburgh Plate Glass*, 360 US, at 410, 3 L ed 2d at 1332 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

That Barnes was a key witness, as a matter of fact the only witness, against the Appellants is, of course, self-evident. Therefore, the materiality of his testimony before the Grand Jury is equally evident. As a matter of fact, the Court directed much of this testimony to be turned over and it disclosed many inconsistencies. What the balance of his testimony might have disclosed and what effect it may have had upon the testimony offered in direct examination cannot be ascertained. The trial court, it is submitted should have adhered to the rule of the *Dennis* case, which it clearly understood and recognized, and have examined all of Barnes' testimony and then permitted counsel for the defense to examine the same. To suggest as the government did that the investigation was continuing is no answer to a defendant's rights to ferret out the truth. As a matter of actual fact, the Grand Jury which was investigating Barnes' activities did not return any later indictments and was discharged shortly thereafter.

As the Supreme Court pointed out in the *Dennis* case a conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. Under these circumstances, it is especially important that the defense, the judge and the jury, should have the asurance that the doors that may lead to the truth are unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.

The problem in not permitting defense counsel to examine Grand Jury minutes of a witness' testimony in toto is glaringly demconstrated in the present case. If counsel for Appellant Klein had not realized that several pages of obviously relevant testimony had been omitted, it would not have occurred to him that Appellant Klein was not the one who arranged for the sale of the Burka fur coat to Vic, the flower man, and he perhaps would not have inquired

further of the witness Barnes concerning the same. Being furnished with the Grand Jury testimony, at his request, he did inquire further, and discovered that it was not Klein at all who had arranged for the sale, but one Dum-Dum, whoever he may be, who was involved. The Grand Jury minutes made no mention of Klein. Consequently, the trial judge might have felt that it was not pertinent or material. That it was is obvious.[24]

The fact that the trial court allowed defense counsel to examine some of the Grand Jury minutes of witness Barnes was sufficient, it is submitted, to establish a showing of a "particularized need" for the disclosure of all the Grand Jury testimony. *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395. It is submitted that a need for such a showing is no longer necessary under the *Dennis* case. See *Allen v. U.S.*, ___ U.S. App. D.C. ___, 390 F.2d 476.

The Court in *Allen* summarized pertinent criteria that had been set forth in *Dennis* by saying "In Dennis, the Court enumerated several 'circumstances' which went 'substantially' beyond the minimum required" to demonstrate some need for disclosure, including: The testimony given before the Grand Jury was substantially fresher than that given at trial. The persons whose Grand Jury testimony was sought were key witnesses at trial. The determination of guilt or innocence turned on the accuracy of the testimony of the key witnesses.

[24]It seems rather strange that having just been furnished with the Grand Jury minutes identifying Dum-Dum as the person who arranged for the sale of the Burka coat to Vic, the flower man, that interrogation of Barnes concerning his direct testimony that Klein was involved elicited the answer from Barnes that he never testified that Klein arranged for the sale, but that it was Dum-Dum. (See TR. 1367): Question by prosecutor, Mr. Sullivan: "Who if anyone had told you about Vic, the flower man? Answer: Henry (Klein). Question: . . . Can you tell us what Klein told you about Vic, the flower man before you brought the coat for sale? Answer: He told me he was good for me to meet and he wanted a coat". On cross examination, Barnes denied testifying that Klein told him anything about selling Vic a fur coat. (TR. 1850-1851).

The witnesses involved had reasons for hostility toward petitioners. Finally, upon cross-examination, it developed that one witness professed that he had made material mistakes in earlier testimony. These factors going 'substantially beyond the minimum required' are not all indispensable to a showing of need. Nor does this list exhaust the relevant considerations."

It is readily apparent that many of the considerations mentioned above, as well as others, are present in the case at bar. In the present case, a substantial part of the prosecution's case rested upon the uncorroborated testimony of its key witness Robert E. Barnes. Since the case involved a conspiracy there was the ever present risk that inaccuracies in testimony would wrongfully attribute actions to one or more of the co-defendants. This risk was heightened by the dubious credibility of the government's key witness who testified voluntarily and in surprising detail concerning numerous actions of the co-defendants over a long period of time. Such a situation requires a searching and pointed cross-examination by a well informed and well prepared defense counsel. Adequate preparation could have only been made if the defnese had been permitted to examine all of the relevant Grand Jury testimony of Barnes prior to the trial.

In the face of these compelling reasons in support of the defense counsel's need to examine the Grand Jury testimony, the prosecution advanced no valid argument as to why the testimony should be kept secret. But at the trial any testimony that was made available to the defense was given in a piecemeal fashion and only at the discretion of the trial judge with the consent of the prosecution. Such procedure made adequate study and preparation impossible.

It is therefore the contention of appellants that the rule that emerges from *Dennis* and *Allen* is that Grand Jury testimony should generally be made available to defense counsel unless there are com-

pelling circumstances requiring secrecy. In the case at bar, there were no compelling circumstances that required secrecy. In fact, the record reveals a situation in which disclosure was imperative. Appellants were therefore substantially prejudiced by the failure of the trial court to permit the disclosure of all of the Grand Jury testimony in a manner that would have enabled the defense to make effective use of its contents.

IV

ELECTRONIC SURVEILLANCE OF TELEPHONE AND FACE-TO-FACE CONVERSATIONS WERE IMPROPERLY ADMITTED INTO EVIDENCE AND CONSTITUTES REVERSIBLE ERROR.

The Government informed the lower court that it intended to introduce into evidence certain tape recordings of telephone conversations carried on between Appellant Klein and James Skinner Skeens and his wife, Marsha Skeens. These recorded telephone conversations were held between Klein and Marsha Skeens on November 29, 1965,[25] and December 21, 1965.[26] The telephone conversation between James Skinner Skeens and Klein was carried on February 5, 1966.[27] On December 10, 1965, a face-to-face conversation carried on between Marsha Skeens and Klein in Klein's place of business was, by use of a hidden microphone, transmitted to a police vehicle and there monitored and rape recorded.[28] On February 7, 1966, by prearrangement with the police and the United States Attorney, Skeens arranged to have Klein meet him at Caruso's Restaurant on Eleventh

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[25]This recording is transcribed in the record at pages 4672 et seq.

[26]This is transcribed at pp. 5007 et seq. of the record.

[27]This is at pp. 5205 et seq. of the transcript. Note correction on p. 5217 where word "involved" was omitted. Should read "No, nobody was involved."

[28]pp. 5236A et seq. of transcript.

Street. Skeens was fitted with a hidden microphone which transmitted the conversation to a receiving machine located in a room in the Harrington Hotel across the street from Caruso's. The conversation was allegedly heard by those present and electronically recorded.

The tape recordings of all conversations were deemed by the Court to be sufficiently clear to be played to the jury except for the recording of the conversation of February 7, 1966, which took place in Caruso's. The police officers who recorded the conversations made no transcripts of them (for the reason that they were too busy to do so) and that, although, they realized immediately after the conversation at Caruso's that the tape recording was not intelligible, none at any time recorded his recollection of the conversation as he heard it.[29] A third conversation between Skeens and Klein on February 23, 1966, was garbled and unintelligible but no effort was made to introdue any evidence concerning this conversation. No explanation was offered as to why an additional conversation on February 23 was carried on.

The trial court, over objection, admitted into evidence all tape recordings except of the conversation which occurred at Caruso's Restaurant, which the Court permitted the Government to prove by the testimony of the police officers who were permitted to testify from memory as to what they heard almost two years earlier. The Government did not call as witnesses before the jury the parties to the conversations, namely, Skinner Skeens and Marsha Skeens, although both were available to the Government. They were called, however, out of the presence of the jury for the purpose of estab-

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[29]For example, Detective Moriarity testified that although he listened to the other tapes right after they were made, he did not listen to the tape of Skeens at Caruso's for a year (Tr. 5138). A reading of the transcript of each officer's testimony discloses glaring inconsistencies. (See Vol. 21 pp. 5316 to end.)

lishing that they were aware of the fact that their conversations were being monitored and that they had consented thereto.[30]

The objections made in the Court below and the contentions presented to this Court are predicated upon constitutional and statutory grounds, namely that the use of such evidence is violative of the Fourth and Fifth Amendments and of the Federal Communications Act of 1934.

In *Berger v. New York,* 388 U.S. 41, 18 L.Ed.2d 1040, 87 S. Ct. 1873, the Supreme Court of the United States held that eavesdropping by the use of a recording device was a search within the meaning of the Fourth Amendment and that, under such Amendment, authority in the nature of a warrant must be obtained upon probable cause supported by oath or affirmation and must particularly describe the place to be searched, and the persons or things to be seized. Thus, the Court unequivocally held that intangible evidence such as verbal utterances fell within the protection of the Fourth Amendment.

Answering the contention that electronic eavesdropping is a most important technique of law enforcement and that outlawing it would severly cripple crime detection, the Court stated that

> "We cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as a basic to the privacy of every home in America . . . it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost

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[30]Barnes explained how he had planned to give the F.B.I. false leads in a robbery case by the skillful use of a tapped telephone conversation (TR. 3107) This is the skill used by the Skeens in this case.

secrets of one's home or the office are invaded."[31] (388 U.S. at 62)

The scope of the Supreme Court's opinion in the *Berger* case is vividly demonstrated by Mr. Justice Black's dissent when he said, "the Court's opinion leaves a definite impression that all eavesdropping is governed by the Fourth Amendment. Such a step would require overruling almost every opinion that this Court has ever written on the subject. Indeed, from the Court's eavesdropping catalogue of horrors–electronic rays beamed at walls, lapel and cuff link microphones, and off premise parabolic microphones–it does not take too much insight to see that the Court is about ready to do, if it has not up today done just that . . . (388 U.S. at 83), Now, if never before the Court's purpose is clear: It is determined to ban all eavesdropping. As the Court recognizes, eavesdropping 'necessarily . . . depends on secrecy'. Since secrecy is an essential, indeed a definitional element of eavesdropping when the Court says that there shall be no eavesdropping without notice, the Court means to inform the Nation there shall be no eavesdropping–period (388 U.S. at 86).[32]

In *Katz v. United States,* 389 U.S. 347 (1967) the Supreme Court reversed a conviction obtained after a trial during which the Government had introduced defendant's telephone conversation overheard by federal agents through a device they had attached to the outside of a public telephone booth. This surveillance, not being supported by a proper warrant or judicial order, was held to be per

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[31] It is significant, we submit, that the Court refers to the concurring and dissenting opinion in *Lopez v. United States,* 373 U.S. 427.

[32] The rationale of *Berger v. New York, supra,* follows the reasoning of Mr. Justice Burton in the dissent in *On Lee v. United States,* 343 U.S. 747, 96 L.Ed. 1270, 72 S.Ct. 967. In that case, Justices Black, Frankfurter and Douglas also registered dissent. One must agree with Mr. Justice Black in *Berger* that the *On Lee* case is difficult to reconcile with the majority opinion in *Berger.*

se unreasonable under the Fourth Amendment even though the investigation of the law enforcement officers established a strong probability that defendant was violating Federal law. Mr. Justice Stewart pointed out that "the Fourth Amendment protects people, not places," and that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

In a case very similar to the case at bar, the United States Court of Appeals for the Seventh Circuit in *United States v. White* (decided March 18, 1968), stated that the crucial question is whether a defendant seeks to exclude the "uninvited ear."

In the *White* case, a Government informer met defendant in the kitchen of the informer's home. He had concealed on his person a radio transmitter. While a narcotics agent was concealed in the kitchen closet, he overheard a conversation between the informer and the defendant and observed the defendant giving a package to the informer. The package contained heroin. The closet had two doors which the agent left ajar so that he could see the defendant and the informer, who asked the number of ounces in the package of defendant's and he said "one good ounce." Defendant added that he would come the next day for the money. Another agent overheard this conversation through a receiver. Several days later the informer, fitted with a transmitter, went to the defendant's residence and had a conversation with him which was overheard by the agent on the radio receiver. Another conversation was held several days later in the informer's car which was overheard by the agent who was following in a second car. At a later date an agent concealed himself in a closet in the informer's house where he overheard a conversation between the informer and the defendant. The second agent listened to the conversation by radio receiver. There were other similar conversations. Objections to the introduction of the testimony by the agents was overruled. In reversing the Court of Appeals held that the evidence was

inadmissible on the authority of *Katz v. United States, supra.* The Court stated that the well laid plans of the law enforcement officers were obviously made because the Government recognized that the defendant sought to exclude the "uninvited ear." Otherwise, asked the Court, why would it have hired an informer, and placed upon his person a hidden radio transmitter and concealed an agent to have the conversation between the informer and the defendant overheard.

The Government in the present case, it is assumed, will rely strongly upon the case of *On Lee v. United States,* 343 U.S. 747, and *Lopez v. United States,* 373 U.S. 427. It is conceded that the Supreme Court did not expressly overrule either of these cases in *Katz v. United States, supra.* It is submitted, however, that the Court did, in fact, destroy their vitality.

In *Dancy v. United States,* 390 F.2d 370, the Circuit Court of Appeals for the Fifth Circuit held—contrary to appellant's contention here—that despite the *Katz* case, a federal agent could testify to a conversation between the defendant and a third person which he overheard through the use of an electronic transmitter hidden on the third person. Judge Fahy, sitting by designation, registered a vigorous dissent which, it is submitted, is strongly persuasive in support of appellants' position. Appellants therefore urge studied consideration of Judge Fahy's views. His analysis in a case identical to the one at bar cannot be improved upon. He there stated:

> In *Osborn v. United States,* 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394, relied upon by the court, there was prior judicial approval of the challenged recording; and in *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374, and *Lewis v. Untied States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312, also relied upon, neither recordings nor transmissions were involved. The challenged testimony were statements of government informers which had been made direct-

ly to them or in their presence. None of these cases seems to me to be apposite to appellant's case.

Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 is more nearly in point but it too has features, emphasized in both the majority opinion of Mr. Justice Harlan and the concurring opinion of the Chief Justice, which distinguish it from the present case. In *Lopez* a concealed instrument on the person of an undercover agent recorded a conversation between him and the defendant. Admission in evidence of the recording itself to corroborate the testimony of the undercover agent was upheld in the circumstances of the case. In so ruling the Court referred to the decisions in which it had "sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L.Ed. 944; *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 129, 86 L.Ed. 1322," 373 U.S. at 438, 83 S.Ct. 1387.

In *Katz*, however, the Court "conclude[d] that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." Those decisions were expressly overruled. Moreover, the *Katz* case, as shall be seen, factually resembles ours more closely than it resembles *Lopez*.

The court also cites, and the government relies upon, *On Lee v. United States*, 373 U.S. 747, 72 S. Ct. 967, 96 L.Ed. 1270. The Court in *Lopez* referred to *On Lee*, but only to point out that *On Lee* did not help Lopez. Reliance was not placed upon *On Lee*, and the Chief Justice was careful in his concur-

ring opinion to make plain that he could not join in any implication that the majority was accepting the continued vitality of *On Lee*. In any event, the problem we have is whether the Supreme Court's more recent decision in *Katz* governs the present case. Except for *Katz* I think we would be bound by *On Lee*[1]. With *Katz* supervening I cannot think we are bound.

In *On Lee* an electronic device concealed on the person of an undercover agent transmitted two conversations between the agent and the defendant, one of which took place in the defendant's laundry establishment and the other a few days later on the street. On each occasion the transmitted conversation was heard by a government agent stationed nearby with a receiving device. This agent's testimony as to what he had heard was held admissible. In *Katz* an electronic device concealed in the top of a public telephone booth transmitted to nearby government agents words spoken by defendant over the telephone to a person in another state. The agents' testimony as to what they heard in this manner was held inadmissible.

In neither *On Lee* nor *Katz* was the challenged testimony in corroboration of the testimony of the person to whom the defendant was actually speaking, the situation in *Lopez*. The result is that the only arguably

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[1]It might be thought that we should be bound also by *Lopez;* but I think that case stands apart now on the basis of the special reasons set forth in the majority and concurring opinions. While the Court did not accept the views of the dissenting opinion of Mr. Justice Brennan that the recording was in reality the same as a third person, there is the factual difference between *Lopez* and *Katz* that in the latter the excluded evidence was the testimony of a third person rather than, as in *Lopez*, a recording on an instrument attached to the person to whom the defendant spoke.

relevant factual differences between *On Lee* and *Katz* were the location of the electronic transmitter and the fact that in *On Lee* the person to whom the defendant spoke was a government agent whereas in *Katz* he was not. The Supreme Court held in *On Lee* that there was no "unlawful search and seizure such as is proscribed by the Fourth Amendment," and said "no trespass was committed." 343 U.S. at 751, 72 S. Ct. at 971. In *Katz* the Court held that "the Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." As to the absence of a trespass in *Katz* the Court stated, "we have expressly held that the Fourth Amendment * * * extends as well to the recording of oral statements, overheard without any 'technical trespass under * * * local property law.' *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5L.Ed.2d 734."

The testimony by Seibert in the present case, like the testimony in *Katz,* was the fruit of an intrusion upon a conversation by an uninvited ear by means of electronic devices. The conversations in both cases were otherwise private. In our case the conversation took place in a private apartment. Appellant's words were intended to be heard only by the informer, as the words of defendant in *Katz* were intended to be heard only by the person at the receiving end of the telephone.[2] Seibert could not have heard the conversation except for his intrusion from outside through the electronic instruments. As in both *On Lee* and *Katz* the reception of the transmitted conversation was en-

[2] "Not involved is a listening in on an extension of telephone line. See Rathbun v. United States, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134."

> tirely external to the place occupied by the defendant when he spoke.
>
> I am unable to draw a constitutional distinction between the present case and *Katz*. For this reason I follow *Katz* as the holding of the Supreme Court applicable to this case.

The precise issue here involved has not been decided by this Court since the Supreme Court decision in *Katz*. Judge Fahy's views however, should be adopted.[33]

Telephone recordings violate Federal Communications Act

A second and equally important ground for excluding the recorded telephone conversations introduced into evidence is found in the provision of Section 605 of the Communications Act of 1934, 47 U.S.C.A. 5605, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effecting or meaning of such intercepted communication to any person."

The purpose of this section is clear and has been stated many times. In *Nardone v. United States*, 308 U.S. 338, the Supreme Court noted that this statute was based upon "broad considerations of morality and public well being" and that Congress outlawed interception of telephone messages because it was "inconsistent with ethical standards and destructive of personal liberty."

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[33] The *On Lee* case has been the subject of criticism by Law Journal writers. *Buchwald "Eavesdropping Informers, and the Right of Privacy: A Judicial Tightrope"*, 52 Cornell Law Quar. 975 (1967); **Note**, *Admissibility of Secretly Recorded Evidence*, 77 Harv. Law Rev. 111 (1963); **Note**, 26 Conn. Bar Journal 407 (1952); **Note**, 30 Chicago-Kent Rev. 355 (1951).

In *Weiss v. United States,* 308 U.S. 321 (1931), the Supreme Court in interpreting this section of the Communications Act of 1934 pointed out that while consent to intercept or divulge was permitted what was contemplated was voluntary consent and not enforced agreement. In that case, which involved a conspiracy, telephone messages were intercepted without the knowledge of the parties. The intercepted messages were stenographically taken and also recorded on phonograph discs. At the trial, it appeared that one of the defendants who pleaded guilty had been confronted with the phonograph records and had thereafter decided to plead guilty and become a witness for the Government. Others did likewise. It appears that one of the defendant's license to practice medicine had not been revoked nor was he required to plead to the indictment. In addition he was paid a salary by the Government. Three other defendants' sentences were suspended. All of this followed their authorization to divulge the contents of the telephone conversations. Under the circumstances, the Supreme Court found such consent to be ~~valid.~~ INVALID.

In *United States v. Laughlin,* 22 F. Supp. 264 (1963), Judge Youngdahl ruled that consent to the interception of a telephone conversation was involuntary when it resulted from an implied threat made to a Grand Jury witness of being indicted for perjury if she did not cooperate. The witness cooperated because she "thought it would be best for me". In that case the implied threat was made by the same Assistant United States Attorney who apparently prevailed upon Skeens and his wife to engage in the monitored conversations with Appellant Klein. Compare cases like *Judd v. United States,* 89 U.S. App.D.C. 64, 190 F.2d 649 and *Williams v. United States,* 105 U.S. App. D.C. 41, 263 F.2d 487, where this Court held that consent to a search must be given freely and voluntarily and without pressure, physical or psychological.

A careful examination of the record in the case at bar leads one to the inescapable conclusion that the consent given by Skeens and

his wife was not voluntary. While each stated that they knew their conversations were being monitored and had agreed to have them recorded, their decision and actions were obviously induced by hope of favor and leniency and of escape from prosecution.

Thus, it appears that Marsha Skeens, called by the Government to testify out of the presence of the jury, (but not before the jury) stated that she first had contact with the United States Attorney in connection with the Barnes matter in the latter part of November 1965 when she was asked to come to the United States Attorney's office (TR 285); that she knew that one of the parties involved in the investigation then going on was her husband (TR 293); that although, because of jail restrictions, she couldn't bring her three year old daughter to visit her husband at jail, Mr. Sullivan arranged for her to have the child at the District Court to visit with her husband where they spent about an hour and a half together (TR 306); that she appeared before the Grand Jury in the latter part of 1965 and gave testimony (TR 303); she talked to her husband about cooperating with the United States Attorney (TR 306) because she did not want him "sitting behind the defense chair"; as a matter of fact, she didn't want him to be sitting in the courtroom at all either as a witness or a defendant (TR 309); that she sppeared as a witness for Barnes in a criminal case in the District of Columbia and gave false testimony that at the time the crime was alleged to have been committed he was with her having his hair dyed, and that she was aware that Barnes later pleaded guilty to that very crime (TR 316-317); that she had received fur coats stolen from the French Poodle and that she had discussed this with the prosecuting authorities (TR-318); that she has never been charged, arrested or indicted for any activities connected with Barnes;[34] and that when she first came down to see the United States Attorney she was not sure which side to take and that she realized that there was going to be an investigation, there were going

[34]Mrs. Skeens set up a job for him in North Carolina (TR. 3039-4).

to be charges made and that there was going to be a lot of people indicted and convicted, and that she could either take her chances of being indicted or she could either be a "witness" so she decided to play the game rather than personally get involved by possibly being charged (TR 322-323). Mrs. Skeens also discussed with the United States Attorney her father's part in housebreaking activities with Barnes and that she told the United States Attorney that to her own knowledge her father participated in the Bastedo housebreaking; to her knowledge her father has never been charged, arrested or indicted for it (TR 322). Mrs. Skeens further testified that on February 4, 1966, (at about the time of her visit with her husband and daughter in the Courthouse) she personally wrote on yellow lined paper a statement to which she signed her husband's name and which she mailed to Judge Matthews (TR 310-311). This is the motion for release on bond which was filed in the United States District Court in the case of *United States v. Skeens,* Criminal No. 314-63, on February 4, 1966, and which was presented immediately to Judge Matthews. It also appears in the record that when this document was presented to Judge Matthews, Assistant United States Attorney Harold Sullivan appeared before Judge Matthews to advise her that James Skeens was cooperating with the United States Government.

Skeens was released from custody without delay and on the very same day or next day made his telephone call to Appellant Klein.

Detective Moriarity testified that Mrs. Skeens' father, Sal Tresi, was involved in housebreakings with Barnes but was never charged (TR 41); that James Skeens, while incarcerated, was brought to the courthouse where he visited his wife and three year old daughter, (TR 52); that he gave Skeens some candy to give to his daughter (TR 54); that Skeens indicated that he was looking for some help and that if Skeens cooperated Mr. Sullivan would make it known to interested people that he was cooperating with the Government; by interested people he got the impression that Sullivan meant "the

court authorities"; that at that time, Mr. Skeens was anxious to get out on bond, and was, in fact, released on bond the day before the first recorded conversation was had with Klein "so that Skeens' co-operation commenced immediately upon his release from custody" (TR 57-62); Moriarity stated, "I just got the impression that this man decided to cooperate with the Government to get out of jail and to alleviate his problem" (TR 63).

James Skeens, called by the government out of the presence of the jury, testified that he was incarcerated in jail from December 2, 1965 until his release on bond in February 1966; (TR 240); that he was brought up from jail while incarcerated to see his wife and daughter although, at the time, he did not know why he was being brought to the courthouse, and no one told him that he was going to see his daughter; that he visited with his daughter for about an hour or two. He was not clear in this testimony as to when he had talked to Mr. Sullivan although the day he saw his child was the first time he had met Mr. Sullivan (TR 243). Prior to the time that he got out of jail, he had a discussion with Mr. Sullivan about his involvement with Barnes at which time Sullivan asked for his cooperation which he agreed to give (TR 243-244); when asked why he cooperated, he stated, "I have no answer for that" (TR 245) although his wife convinced him that he would be better off if he tried to help than otherwise (TR 246).

Skeens testified further that the petition for bond which was granted by Judge Matthews on the date that it was filed, February 4, 1966, was signed by him (contrary to Mrs. Skeens' testimony) but written by an inmate in jail, Raymond Epperson; (contrary to Mrs. Skeens' testimony that she wrote it) (TR 258-260); Skeens admitted that on December 16, 1965, he had filed a petition with Judge Matthews seeking to be released on bond but that petition was denied (TR 262-263). When he filed the motion on February 4, 1966, how-

ever, he gained his release without delay. He admitted that Detective Moriarity furnished him with candy to give to his daughter (TR 265); that at the time he filed his petition for bond on February 4, 1966, he had not conferred or consulted with his attorney (TR 266-267). As a matter of fact, he did not want his attorney to know that he was cooperating with the Government (TR 276). He testified further that he cooperated "for the benefit of them (his wife and daughter) and myself if I could possibly get any" and that he considered getting out on bond in February a benefit to him (TR 274-275); that it was a break for him (TR-277). Mr. Sullivan, Assistant United States Attorney, stipulated that he went to Judge Matthews personally on behalf of Mr. Skeens and advised Judge Matthews on February 4, 1966, shortly before Skeens was released from incarceration, and advised Judge Matthews that he was cooperating with the United States Attorney's office and that that should be known to the Court; it was further stipulated that in the fall of 1966 after Skeens pleased guilty to an indictment charging certain felonies arising out of gambling transactions, Mr. Sullivan advised Judge Curran that Skeens was cooperating with the United States and that this should be made known to the Court prior to imposition of sentence and that although Skeens was being represented by counsel at the time they did not know of this fact. (TR 277-278)

The record in this case also reveals that in March, 1968, on a removal warrant the United States Commissioner in the United States District Court for the Middle District of Pennsylvania (Docket No. 1-116) noted "upon recommendation of United States Attorney Harold Sullivan as per telephone conversation March 1, 1968—defendants' [Skeens] bond reduced [from $5,000] to ~~our~~ recognizance". See Clerk's file.

The record is clear that Mrs. Skeens was never charged with any offense and that her father, Sal Tresi, was likewise, never charged.

It is further crystal clear that although James Skeens was indicted as a co-conspirator with the appellants his case was severed and to date, two and one half years after the date of indictment, he has not been tried. It appears that Skeens' cooperation with the Government includes within it the disavowal of any promises made. Circumstances, however, can be more glowing than words. In light of the record as appears herein, can anyone say that Mr. or Mrs. Skeens' consent to engage Appellant Klein in conversation for the purpose of having the same recorded by police officers was not given in full anticipation of reward which actually came not more than 24 hours after cooperation by Skeens was indicated. Why was it that Skeens' petition for bond was turned down in December 1965, prior to cooperation, and was granted on February 4, 1966, after cooperation. Could the United States Attorney's visit to Judge Matthews advising the Court of Skeens' agreement to play ball with the Government have gained Skeens his freedom which he himself considered a favor to him. It is submitted that this is as clear as the fact that day follows night and night follows day. Moreover, why hasn't Skeens been tried and why does Mrs. Skeens' father, Sal Tresi, walk free? Why did Mr. Sullivan call the U. S. Commissioner in Pennsylvania and arrange for Skeens to be released on personal bond?

It seems rather strange by contrast that Otis Diggs, an employee of and witness for Appellant Klein, was offered a job on three occasions by Mr. Sullivan (TR 5946-5950). The truth of Diggs' testimony to this effect was conceded by the United States Attorney.

In the present case, Mrs. Skeens picked the right side of the fence to be on as she felt she had to do when confronted by the United States Attorney, and James Skeens, as she had hoped and seems to have been assured, would not have to sit in the Courtroom in this case either as a witness or a defendant. To date, he has not appeared as either.

It is submitted that the decision of Judge Youngdahl in *United States v. Laughlin, supra,* is controlling in this case and provides substantial and compelling reasons for holding that the interception and divulgence of the telephone conversations herein involved were prohibited by Section 605 of the Communications Act of 1934. To hold that the cooperation and consent in the circumstances of the present case was given voluntarily without suggestion of favor, reward or leniency or without fear of adverse action is to do violence to the intent of Congress in proscribing the limits of police power when it adopted Section 605 of the Communications Act of 1934. The broad consideration of morality and ethical standards envisioned in that law would be destroyed. *Nardone v. United States,* 308 U.S. 338.

V.

EACH APPELLANT WAS DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE RECORD AT BEST ESTABLISHES A SERIES OF CONSPIRACIES AND NOT A SINGLE CONSPIRACY

The appellants submit that the evidence offered by the Government in support of the allegations claimed in Count I, charging the defendants with conspiracy, if believed, established many separate conspiracies. The law is very clear in a trial for conspiracy, that a conviction cannot stand when in the trial more than one conspiracy was proved. *Kotteakos v. United States*, 348 U.S. 750.

The government failed completely to show that the appellants, Tavenner, Hamilton and Riggin, had any connection with any agreement that Barnes may have had with the appellant Klein. This is shown in Barnes' testimony in Vol. 9 of the transcript at pages 1351 and 1354 as follows:

(Page 1351)
Q. Can you tell us whether any of those three individuals participated in any way with this working arrangement you had with Klein?
A. I don't know what you mean by participated with me.

Q. All right. Mr. Barnes, what I mean is this: Can you tell us, first of all, what the defendant No. 2, Earl Tavenner's role was in connection with that arrangement with Klein?
A. Well, he knew that Henry was setting up scores for me and that I was selling the jewelry to Klein and the scores he set up I would sell the jewelry to Klein, too, if he wanted it.

Q. When you say if he wanted it, do you mean Klein or Tavenner?
A. If Klein wanted it.

Q. Next, can you tell us what the role of the defendant Riggin was, defendnat No. 3?
A. He knew that Henry was setting up scores for me.

Q. All right, sir.

(Page 1354)

Q. What did the defendant Riggin say concerning his own relationships with Klein during that period, Mr. Barnes, in those conversations?
A. He said that Henry wouldn't deal with Bobby and that everything that Bobby stole Buster had to get rid of for him through Klein.

This testimony by Barnes, as shown on Page 1354, shows another conspiracy than the one alleged in the indictment in which Barnes was a co-conspirator. It is very clear that Barnes was not a part of the conspiracy that he is discussing here.

The Supreme Court has "repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-

sweeping nets of conspiracy prosecutions. *Grunewald v. United States* 353 U S. 391. There was no evidence of an intentional participation by all of the appellants in a single plan with a view and purpose to further a common design. Mere knowledge is not enough. *United States v. Falcone,* 311 U.S. 199.

The defendants in the indictment were charged with having *agreed together* with Barnes to violate the laws of the District of Columbia. We realize the law does not require proof of a formally executed agreeement in conspiracy cases, but it does require that there be an agreement as shown by acts of reasonable inference that each defendant is knowingly and intentionally joining in accomplishing the purpose of the conspiracy. *Danielson v. United States,* 321 F2d 441 (9th Cir.) The facts in this case fail to show that any one of these appellants had any understanding that they were part of any joint plan or scheme with others. If we believe the testimony of Barnes, we would have to conclude that each of the appellants was engaged in an individual conspiracy with Barnes, *cf. United States v. Rosenberg,* 195 F2d 583 (2nd Cir.). Barnes testified that he had an agreement with Klein, whereby *Klein* furnished him names and addresses of people whose houses were to be burglarized and that *Klein* would share in the profit or be entitled to buy the articles stolen. Not one of the other three appellants was part of this agreement between Klein and Barnes. There is nothing in the record to support any conclusion except that Barnes was a loner who from time to time used other people to aid and abet him. This does not transform each of these aiders and abettors into conspirators working toward a common goal. Barnes did testify that Klein gave him the name and address of what he called the Bastedo housebreaking. Barnes further testified that he went to the Bastedo residence and broke in and that he found that there was a safe therein that he needed more tools to get into and he therefore left, and when he broke in the second time he had brought appellant Earl Tavenner

with him to stay in the living room while he peeled the door of the safe in another room and removed the valuables. Nowhere in his testimony did he say Tavenner knew anything about Klein having supplied the information in this case or that Tavenner had any knowledge that he was a part of or furthering the common objects of a conspiracy with Klein. A fair evaluation of Barnes' testimony concerning this housebreaking, if believed, would indicate that Tavenner engaged in a conspiracy with Barnes other than the one alleged in the indictment.

Barnes testified that he and the appellant Hamilton, broke into and robbed a Greek Church on 16th Street N.W. He did not testify that any of the other persons named in the conspiracy had *anything* to do with setting up or committing this job. This, if anything, was a separate conspiracy between Hamilton and Barnes.

Barnes testified that he stole a diamond from a Mrs. McLean in the Bahamas and brought it to Washington, D. C. Barnes said that when he brought the diamond back, that Tavenner helped him protect it and went with him to New York when he, Barnes, disposed of it and gave Tavenner part of the proceeds. This, if believed, was certainly a separate conspiracy, distinct from the one alleged in the indictment.

The appellant Tavenner, was accused by Barnes in one more matter, which again, was a separate and distinct conspiracy from the one alleged in the indictment. Barnes testified that Tavenner told him that a man by the name of Nader had a large sum of money in his house, that he was a bookmaker and as a result of this information, he, Barnes, by himself, burglarized the house, and that he stole about $300.00 and a Star Sapphire ring, all of which he kept and gave nothing to Tavenner.

Barnes testified to two matters involving the appellant Walter Riggin. The first one, he said, was the residence of one Sarah Kotz

from which he stole $8,700.00. He testified that Riggin had called him and told him to meet him in front of the Woodner Hotel and that when he arrived there Riggin told him that Sarah Kotz lived in an apartment in the Woodner and that she had a large sum of cash there. He stated further, that Riggin said he wanted the appellant Hamilton included in the "deal" and that he, Barnes, then took Hamilton with him as a lookout while he burglarized the Kotz apartment, and that he gave Riggin $2,900.00, Hamilton $2,900.00, and kept $2,900.00 himself. The only other matter that Barnes testified Riggin was involved in was a housebreaking on one George Sharman. He stated that he was in the apartment of Riggin and Riggin told him that Sharman was a bookmaker and that he kept considerable money in his home. As a result of this information he said he broke into the Sharman house and stole a briefcase with about $300.00 in silver dollars in it and that he gave Riggin half of the silver dollars. Here again, if the evidence is believed as to Riggin, it clearly shows a separate and distinct conspiracy in both of these matters from the one alleged in the indictment.

The government joined all of Barnes activities as a housebreaker into one massive conspiracy, taking each individual crime and joining it with all others so that it could get the benefit of a conspiracy trial.

The government in the lengthy trial of this case completely overwhelmed the jury in introducing so much testimony that had nothing to do with the case on trial that it was impossible for the appellants to have received a fair trial. Barnes testified that he had broken into hundreds of homes in the District of Columbia and many of those he testified about. Did the government tie these homes into any of the appellants, either by way of setting up the jobs, participating in them, or receiving any of the property, even in a general sense? In addition, many of these victims were called as witnesses to testi-

fy as to the burglaries. In a number of cases, Barnes denied having committed the housebreakings. The following list of names with the pages of the transcript cited are ones that were never definitely linked with the appellants.

> Lauxam (TR-1534), Commack (TR-1536), Abelman (TR-1537), Carozza (TR-1537), Libby (TR-1499-D), Dr. Thomas (TR-1499-E), Margaret Campbell (TR-1499-F), Kline (TR-1499-I), Wentz Hailey, Rock, (TR-1499-I), McCallum (TR-1499-J), Parker (TR-1464), Abe Goldberg (TR-1464), Mrs. Coyne (TR-1923), O'Sullivan (TR-1502), Gorske (TR-1543), Scrivener (TR-1544), O'Bryant (TR-1499-G).

The parade of witnesses was objected to by the defense on the ground that it would prejudice the defendants, but the government assured the Court that it would be connected up. (TR.-601) The government used Klein's records to introduce numerous names into the trial which, despite assurances by the government, were not connected. The effect was to prejudice the appellants and to deny them a fair trial.

VI

THE TRIAL COURT ERRED IN DENYING MOTIONS FOR SEPARATE TRIALS FOR THE SEVERAL APPELLANTS

Appellants filed motions for a severance of the defendants to provide each a separate trial. These motions were denied.

Rule 14 of the FRCP, as amended on February 28, 1966, provides as follows:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such join-

> der for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial".

The indictment in this case contained the names of 16 persons who were named as conspirators with Robert Earl Barnes, described as a co-conspirator but unindicted. All of the defendants moved for severances which were granted except as to these four appellants. The government vigorously opposed the severing of the trial of these four even though it had been in full possession of all the facts and knowledge pertaining to the accusations claimed in this indictment. The government had known for more than two years exactly what its evidence was going to be and knew, or should have known, that each of these appellants would be unduly and unlawfully prejudiced by being tried together. One has to presume, therefore, that the government deliberately wanted these appellants to be tried together so that by an avalanche of irrelevant testimony they would obtain corroboration of Barnes when none in fact existed. This is borne out by what was adduced at trial and each of these appellants was unlawfully prejudiced.

The appellant Klein was definitely prejudiced in being tried with the other three appellants. There was much testimony concerning the robbing of a Greek Church on 16th Street, N.W., by Barnes and Hamilton. This testimony, if true, established a separate conspiracy between Barnes and Hamilton, and had nothing to do with Klein. There was also considerable testimony about the so-called "big diamond" case involving, according to Barnes, the appellant Tavenner

and others. The only testimony in this matter concerning Klein was by Barnes who said he showed the diamond to Klein and he said he couldn't handle it. This testimony concerning a diamond that was allegedly stolen in the Bahamas and sold in New York, should not have been allowed in the trial of Klein. The Nader housebreaking, according to Barnes' testimony, involved only the appellant Tavenner, who he said gave him information that Nader kept large sums of money in his house. This matter should not have been admitted in the trial of Klein. The housebreaking that Barnes testified to concerning the home of one George Sharman involved only the appellant Riggin, Barnes having testified that Riggin told him that Sharman was a gambler and had large sums of money in his house. Klein had nothing to do with this matter, which, if true, constituted a separate conspiracy between Barnes and Riggin, was prejudiced in his trial by the admission of this testimony. Klein was again prejudiced and did not receive a fair trial when, because of denial of his Motion for a Severance from the other three defendants, he was tried by a jury who heard testimony of still another conspiracy between Barnes, Riggin and Hamilton, and Hamilton and Riggin in the Sarah Kotz housebreaking. Barnes testified in this matter that the money he took from the Sarah Kotz apartment was divided between him, Riggin and Hamilton. Klein had nothing to do with it.

The appellant Riggin was prejudiced by not having a separate trial because the evidence concerning him involved only two of the 100-some housebreakings that Barnes testified to, and at no time was he involved in any manner with the appellant Tavenner and only with Klein by use of a tape that was made after the conspiracy alleged in the indictment had ended, and was therefore, inadmissible against him. The Court instructed the jury that the tape was only admissible against Klein and was not admissible against Riggin. The facts are, however, that it was impossible for the jury to have obeyed the Court instruction because of the emphasis that the government

placed upon this tape. The prosecution from the beginning of its case had full knowledge of the content of this tape and was not only fully aware of the prejudicial effect that it would have upon the jury in considering the charges against Riggin, but relied on it to convict Riggin even though they knew it was inadmissible against Riggin. This is shown by the fact that the government not only introduced the tape but the particular portion that referred to Riggin known as Buster, was played again and again, and was used in cross-examining Klein and Riggin. In addition, the government produced six detectives, Moriarity, Wannamaker, Hudlow, Preston, Woodard and Wert, who testified that on February 5, 1966, they each had listened to the recording of this tape, which is a conversation between Skeens and Klein. Each detective testified that they had heard the part involving Riggin. This was inadmissible as against Riggin and the other appellants and, the jury was so instructed by the Court, only against Klein. The government, however, by this action underscored this part of the tape through these witnesses and so prejudiced the appellant Riggin that it was impossible for the Court to remove this from the minds of the jurors. This part of the tape that was reiterated again and again by the six detectives had Klein saying to Skeens "Buster (Riggin) called me. I hardly know Buster. He has been in my store a few times–he asked me to get a lawyer for Hamilton to help him in the trouble he was in and he was sorry that Hamiltion was demanding things from me or threatening me. Klein also said to Skeens–this is what bugs, the call by Buster to my house like a damned fool the other night. I told Buster, I don't know what he, Hamilton, is talking about, and if he wants to say anything against me, well, that's his prerogative. I know I did a little business with him, but never bought anything from the guy."

The appellant Hamilton who did not take the stand to testify in his own behalf, was as equally prejudiced by the way the government used this evidence which was also inadmissible as to Hamilton.

The appellant Tavenner was also prejudiced by this conduct of the government as is best shown by the argument of government counsel in answering the Motions for Directed Verdicts. The part involving Tavenner in the tape was also repeated and repeated. The prosecuter stated to the Court, quoting from Vol. 22 of the transcript, page 5543, as follows:

> (TR. Vol. 22 page 5543)
>
> "He likewise refers to Earl Tavenner and acknowledges fixing the ring for Earl Tavenner, a finger ring as he points out, just as Barnes had testified such a ring had been taken by Barnes, stolen, brought to Klein and fixed by Klein for the defendant Tavenner, with whom he, Klein, was acquainted, according to Barnes' testimony".

It is submitted that this statement by the government definitely shows that it was their considered intent to use this against Tavenner although it was inadmissible against him. The government by its action clearly shows that they were corroborating Barnes where there was in fact no lawful corroboration in existence.

The government in continually playing the tapes for the jury, both in its case in direct, cross-examination, and in summation to the jury and by the testimony of the six detectives reporting what they heard as it was recorded clearly has shown a situation that is so prejudicial to these appellants that it brings them within the rationale of *Bruton v. United States,* 391 U.S. 123. See also *Baker v. United States,* ___ U.S.App.D.C. ___, decided August 1968.

The recorded conversations which Mr. Klein had with Skeens were characterized by the prosecuting attorney in Vol. 31-A, p. 7041 as follows:

> "Now ladies and gentlemen, from this first tape,which goes on in length, we submit to you that it is not

> what you call a classic confession which begins and spells out word for word exactly what a man did; but from the words and tone, we submit, it clearly shows that what Barnes said about Klein is entirely correct."

In the taped conversations of February 5th and February 7th, 1966, highly prejudicial references were made as to defendant Robert Hamilton. Since it was stipulated that the conspiracy ended September 20, 1965, these taped statements of co-conspirator Henry Klein could only be used against Klein himself. As to the other three they were inadmissable hearsay. The trial judge instructed the jury that the testimony was only admissable as to Klein. Vol. 33, p. 8182 and 8183, as follows:

> ". . . statements of any conspirator, which are not in furtherance of the conspiracy or made before its existence or after its termination, may be considered only as evidence against the person making them. For purposes of this case, it is agreed and stipulated by counsel that if a conspiracy existed it ended as of September 29, 1965."

Until the recent decision of *Bruton v. United States*, supra, decided May 20, 1968, such an instruction was deemed sufficient to negate the prejudicial effect that the inadmissable statement might have on the jury. In *Bruton* the Supreme Court repudiated the thought that the trial judge can remove the effect of inadmissible testimony from the minds of the jurors simply by means of an inocuous instruction. *Bruton* approved the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440 at 453, when he said "The naive assumption that prejudical effects can be overcome by instructions to the jury. . . all practicing lawyers know to be unmitigated fiction. . ."

The prejudicial effect that inadmissable testimony has upon the minds of the jury cannot be removed even if the jury is exposed to

the evidence only once. In the case at bar the prosecuting attorney made repeated and pointed refrences to the contents of a taped telephone conversation containing references tending to implicate Robert Hamilton and Riggin as detailed below.

In the prosecution's direct examination of Detective Preston concerning the tape of February 7, 1966 (Government Exhibit No. 28 at Vol 21, pages 5338 and 5339, the following exchange took place:

> Detective Preston: . . . Then there was some conversation by Mr. Klein that he had received a phone call from Buster and that he thought that this was wrong, that the call concerned Bobby, and that he had only seen Bobby one, two three or four times. And that the gist of the conversation, as I understood it, was that Buster wanted Mr. Klein to–
>
> Mr. Lowe: Your Honor, I am going to object–
>
> Detective Preston: Hire a lawyer–
>
> Mr. Lowe: –as to those words for–
>
> Mr. Sullivan: If your Honor please, the witness has just said the "gist of the conversation," as he understood it.
>
> The Court: The objection is overruled. You may proceed.
>
> Mr. Sullivan: Go ahead.
>
> Detective Preston: Was that Buster wanted Mr. Klein to get a lawyer for Bobby.

Then at Vol. 21, p. 5349, in the cross-examination of Detective Preston by Mr. Margolius:

> Detective Preston: . . . Skeens was assuring him that he wasn't going to see Klein for a lawyer, or anybody asking him for anything, that it was necessary that they talk so that they had the same stories.

At Vol. 21, page 5377, during the cross-examination of Sergeant Hudlow concerning the tape of February 7, 1966, Mr. Hudlow stated:

> . . . Some of the conversation involved–he said, "Darn Buster called me in reference, about getting an attorney for Bobby." Now this as I recall the conversation.

At Vol. 21, page 5404, during the cross-examination of Sergeant Hudlow by Mr. Margolius the following exchange took place concerning the tape of February 7, 1966:

> Mr. Margolius: All right. What was mentioned about Bobby?
>
> Detective Preston: He said that Buster called me and told me about supplying an attorney for this Bobby.

At Vol. 21, p. 5418, during the direct examination of Detective Wanamaker concerning the February 7th tape, Detective Wanamaker stated:

> "Their conversation started out talking about Buster calling him, Henry Klein, regarding getting a lawyer for Bobby Hamilton. . ."

At Vol. 21, p. 5440, during the direct examination of Captain Woodward concerning the tape of February 7th, Captain Woodward stated:

> . . . The conversation went quickly into the fact of Klein stating to Skeens that Buster had called him and wanted him to provide an attorney for Bobby. . .

In Vol. 26, p. 6213, during the cross-examination of Mr. Klein by the prosecution the following exchange took place in reference to the tape of February 5, 1966 (Government exhibit No. 27)

> Mr. Sullivan: The voice that says, "I'll tell you another thing, you know, you might have a problem with that kid Hamilton over there," that is the voice of Mr. Skeens is that right.

Mr. Klein: That's right.

Mr. Sullivan: You took him to mean this defendant, Bobby Hamilton, did you not?

Mr. Klein: Yes, sir.

At Vol. 26, p. 6216, the prosecution played the February 5th tape in which the following exchange took place:

Mr. Skeens: Well, I'll tell you another thing, you know, you might have a problem with that kid Hamilton over there.

Mr. Klein: Yeah, this is what Buster called my house about the other night, like a damned fool.

Mr. Skeens: Well, you see here's what happened, Henry, I was over there, you know. And beefing like Hell, he don't have any money, no lawyer. So you got to watch yourself, you know.

In Vol. 26, p. 6220, during the cross-examination of Mr. Klein by the prosecution, the following exchange took place in reference to the February 5th tape:

Mr. Sullivan: When you say, "Well, all I can do is say this: Like I told Buster, I don't know what he's talking about, and if he wants to say anything against me, well, that's his prerogative. I know I did a little business with him." Whom do you mean by "him"? Hamilton, Barnes or Buster?

Mr. Klein: Hamilton.

At Vol. 26, p. 6227, also during the cross-examination of Mr. Klein by the prosecution, the following dialogue was recorded concerning the February 5th tape:

Mr. Sullivan: When you say you can't do anything for anybody, Bobby or anybody, because I just can't,

> I just can't do it, is the Bobby you are talking about the defendant, Bobby Hamilton?
>
> Mr. Klein: Yes, sir.

At Vol. 31, pp 6958 and 6959, the prosecuting attorney made the following statements in his closing argument:

> Mr. Sullivan: And the same Buster, who, not knowing, so he said, that his nephew had anything to do wrong with Klein, not knowing Klein at all, could not deny, because Klein said it on tape—could not deny that he asked Klein to get a lawyer for his nephew. Is that the action of a man who does not know his nephew is doing something wrong with the same man with whom he is doing something wrong, the jeweler Henry Klein? It is not the action of a man who doesn't know Klein. It is not the action of a man who thinks his nephew is on the up and up. Why would a stranger call a man with whom he had spoken once before in his life, so he says, and say he needed a lawyer through Klein for his nephew Bobby?

At Vol. 31-A, p. 7059, the prosecuting attorney in continuing his closing argument stated:

> Mr. Sullivan: Now, ladies and gentlemen, when Buster called Klein, we submit to you again, when he claims he didn't know Hamilton was doing anything wrong with Klein, he had to have a reason for calling and asking for a lawyer. We submit the reason comes clearly through there. There is no dispute between Klein and Skinner as to who they are talking about. They know who Hamilton is and they know who Buster is.

And at page 7060, the prosecuting attorney continued:

> Mr. Sullivan: And we submit, ladies and gentlemen, from this tape you hear very clear evidence of exactly

> what did take place: Buster's, Bobby's and Barnes' dealings with Klein are spelled out in that tape.

Then continuing on page 7060 the prosecuting attorney states:

> Mr. Sullivan: We submit to you that that is clear evidence that these men were very well acquainted and were associated in this enterprise.

At Vol. 33, p. 8105, near the end of the prosecuting attorney's closing argument he again played a portion of one of the tapes in which Mr. Klein made the following statement:

> Mr. Klein: I don't do anything for anybody, Bobby or anybody, because I just can't, I just can't do it.

The repeated references to the claimed inadmissible telephone conversation must necessarily have had the effect of making an indelible impression upon the minds of the jury. The obvious impression intended was that Klein and Hamilton and Riggin were close associates and that Klein would have a personal interest in securing an attorney for Hamilton. This, it is submitted, falls within the condemnation of *Burton v. United States*, supra.

VII

CAN EVIDENCE AGAINST A DEFENDANT BE INTRODUCED IN A CONSPIRACY TRIAL WHERE SUCH EVIDENCE DOES NOT GO TO THE CONSPIRACY BUT ONLY TO THE SUBSTANTIVE CRIME OF WHICH THE DEFENDANT HAD ALREADY BEEN CONVICTED?

It is clear that a person can be convicted both of the substantive crime and conspiracy to commit that crime where evidence in each case pertains to the charge at issue. It is axiomatic that where the evidence introduced in both trials is for all practical purposes identical and the totality of that evidence is directed to the substan-

tive charge with a corresponding void of evidence of conspiracy, and issue tantamount to double jeopary is raised.

Co-defendant in the case at bar, Robert Hamilton, had been convicted of grand larceny and housebreaking in conneciton with the burglary of the Saints Constantine and Helen Greek Orthodox Church. This case was tried in the United States District Court for the District of Columbia between June 19 and June 26, 1967 (Criminal No. 1133-64).[35]

In the trial of the instant case Hamilton was convicted on the conspiracy count. Although the list of overt acts in the indictment of the conspiracy count did not mention the Greek Church robbery, testimony concerning this crime was in prominence at the trial. The only substantial evidence concerning the overt acts of the conspiracy count was the uncorroborated testimony of Barnes.

An inspection of the testimony used by the prosecution in the conviction of Hamilton in Criminal No. 1133-64 and the testimony concerning the Greek Church introduced in the case at bar will reveal that in both instances the testimony was substantially the same. On the left side of the following diagram there is a list of witnesses who testified for the prosecution at the trial of Criminal No. 1133-64. There is also given a short summary of each witness' testimony. On the right is a list of the prosecution's witnesses who testified concerning the Greek Church in the trial of the present case. A short summary of the witness' testimony *put on in the government's case* follows the name.

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[35] This case is presently being appealed to this Honorable Court.

CRIMINAL NO. 1133-64
WITNESS

1. *Demetrios G. Kalaris*
Pastor of church. Testified as to condition of church before and after burglary. Identified various church property. Testified concerning Barnes asking him about making donation to church.

Vol. I, pages 58-84

2. *Peter H. Paleologos*
Secretary of Church. Testified as to condition of church on morning after burglary. Identified church property and as to what was kept in church safes.

Vol. I, pages 84-101

3 *Charles R. Kirchner*
Police Officer. Testified as to his investigation of the burglary and the arrest of Barnes.

Vol. I, pages 101-130

4. *Albert C. Hillegas*
Police Officer. Testified as to his investigation of burglary and the arrest of Barnes.

Vol. I, pages 130-139

5. *Donald H. Sprowls*
Police Officer. Testified as to arrest of Hamilton and condition of church after burglary. Identified property from scene

Vol. I, pages 139-171

CRIMINAL NO. 595-66
WITNESS

1. *Demetrios G. Kalaris*
Pastor of church. Testified concerning Barnes asking him about making donation to church. Also explained church procedures and condition of church after the burglary.

Vol. 18, pages 4739-4729

2. *Peter H. Paleologos*
Secretary of church. Testified concerning property taken in burglary and gave information about church safes.

Vol. 19, pages 4904-4910

3. Kirchner's partner, Hillegas testified (Below)

4. *Albert C. Hillegas*
Police Officer. Testified as to arrest of Barnes

Vol. 19, pages 4893-4899

5. Sprowls' partner Casciano testified (Below)

6. *Dominick Casciano*
Police Officer. Testified as to the arrest of Hamilton and condition of Church after burglary. Identified prosecution's exhibits of Hamilton's clothes and physical evidence.

Vol. I, pages 171-200

7. *John M. Oliva*
Police Officer. Identified prosecution's exhibits of property taken from Barnes and Hamilton after the burglary.

Vol. II, pages 203-223

8. *Cecil Kirk*
Technician with Police Identification Bureau. Identified photographs taken by him at scene of crime. Also identified other physical evidence.

Vol. II, pages 223-248

9 *Ludwig A. Lewandowski*
Detective. Testified as to his investigation of the church after the burglary. Also, as to Barnes' car and other physical evidence (clothes of Hamilton and Barnes).

Vol. II, pages 248-274, 297-330

10. *Lucas Michos*
Treasurer of Church. Testified as to what was in church's safe at time of burglary.

Vol. II, pages 330-334

6. *Dominick Casciano*
Police Officer. Identified prosecution's exhibits including clothes. Testified concerning the arrest of Hamilton and investigation of the church as well as his handling of the physical evidence.

Vol. 18, pages 4754-4795.

7. *John M. Oliva*
Police Officer. Testified concerning his investigation of the burglary and the physical evidence taken.

Vol. 18, pages 4808-4822

8. *Cecil Kirk*
Technician with Police Identification Bureau. Testified concerning photographs taken by him at scene of crime and other physical evidence.

Vol. 17, pages 4719-4723
Vol. 18, pages 4795-4803

9.

10.

11. *Thomas A. Thorne*
Title Clerk. Department of Motor Vehicles. Testified as to registration of automobile searched by police.

Vol. II, pages 335-336.

12. *Elmer T. Miller*
Special Agent FBI. Testified concerning laboratory analysis of physical evidence involved in case.

Vol. II, pages 337-403

13. *James E. Owens*
Detective. Testified concerning chain of custody of physical evidence involved in case.

Vol. II, pages 403-411

14.

15.

11.

12. *Elmer T. Miller*
Special Agent FBI. Testified concerning laboratory analysis of physical evidence taken from scene of burglary.

Vol. 18, pages 4846-4869.

13. *James E. Owens*
Detective. Testified concerning his investigation on night of the burglary. Also testified concerning handling of physical evidence of case (including clothes).

Vol. 18, pages 4822-4845

14. *James F. Tinker*
Police Officer. Testified concerning arrest of Barnes at scene of crime. Also, identified Hamilton as other subject arrested

Vol. 18, pages 4749-4754

15. *Vertic Gore*
Police Officer. Testified concerning physical evidence taken by police at scene of crime.

Vol. 30, pages 6829-6841

From the above it is apparent that the testimony used by the prosecution at both trials was substantially the same. It consisted of what transpired on the night of the burglary, the physical evidence taken, and its subsequent analysis. Although Barnes allegedly took part in the Greek Church robbery and was mentioned in the testimony in both cases, at no time has the prosecution presented evidence to convict Robert Hamilton of conspiracy with Barnes or anyone else to burglarize the Greek Church.

Although the evidence in both instances was virtually the same and in no way supported the idea of a conspiracy, testimony concerning the Greek Church was prominent in this trial.

This is particularly revealing when considered with the fact that the testimony regarding the Greek Church robbery which linked the actions of Barnes and Hamilton came from credible police officer witnesses, while the testimony concerning the overt acts listed in the conspiracy count rested upon the uncorroberated testimony of Barnes, a man of dubious credibility.

It is appellant's contention that the jury would not have convicted Robert Hamilton on the conspiracy count solely upon the uncorroberated testimony of Barnes. Thus, the conspiracy conviction was directly due to the highly credible testimony concerning the Greek Orthodox Church burglary in which Barnes and Hamilton were mutually implicated. This was the same evidence upon which Hamilton had previously been convicted. The resultant situation is tantamount to double jeopardy or res judicata.

Agreeing that this does not fit the classical definition and case law on double jeopardy the inherent unfairness revealed must certainly be covered within that provision.

VIII

THE TRIAL COURT SHOULD NOT HAVE PERMITTED THE JURY, DURING ITS DELIBERATIONS, TO HAVE HEARD A REPLAY OF THE TAPE RECORDINGS OF APPELLANT KLEIN

During the course of the jury's deliberations, they sent a note to the trial court requesting that the testimony of witness Barnes before the grand jury be read to them. The trial court refused. Thereafter, the jury requested that the tape recordings which had been introduced into evidence be again played for them. This was permitted over Appellants' objection.

Appellants concede the rule to be that it is within the discretion of the trial court to permit jurors to hear requested parts of the transcript of testimony in the midst of their deliberations, although such practice tends to emphasize to the jury the particular evidence requested by them. Where, however, as in the present case, the jury requests several items, including the testimony of Barnes before the Grand Jury, as well as the tape recordings and the court allows them to hear the recordings but does not permit them to hear Barnes' testimony there is, it is submitted, a grave abuse of discretion.

The testimony of Barnes before the Grand Jury was used by defense counsel to contradict statements made by the witness in his direct testimony. That the Grand Jury minutes directly involved gross contradictions is evident from a reading of the statement of the case herein. Obviously, the jury was troubled, and was looking for assistance. In refusing to allow the jury to have the contradictions before the Grand Jury while permitting them to hear the tape recordings, the trial court, it is submitted, abused its discretion and completely over-emphasized, to the prejudice of Appellants, the argument of the prosecution who relied heavily on some questionable statements made by Klein in these recordings.

We urge upon this Court that this denied appellants a fair trial and represents grounds for a reversal, particularly in view of the fact that the entire case revolved around the credibility of the witness Barnes. The trial court's action could have the effect only of presenting to the jury the government's side of the case and of obscuring the defense, namely, that the testimony of Barnes, the self-contradicted informer and admitted thief was thoroughly discredited.

CONCLUSION

For the foregoing reasons, it is submitted that this Honorable Court should reverse the conviction of each Appellant and remand this case for a new trial.

Respectfully submitted,

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Attorney for Appellant Klein

H. Clifford Allder
Attorney for Appellants Riggin
and Tavenner

Ira M. Lowe
Attorney for Appellant Hamilton